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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 652

SAMUEL G. ALBERT,
Petitioner,
vs.
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, NORTHERN DIVISION,
and
HON. W. WALLACE KENT, Judge of said Court,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Samuel G. Albert, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on October 19, 1960.

OPINIONS BELOW

The opinion of the District Court for the Western District of Michigan, Northern Division, is printed as Appendix A, *infra*, and is unreported.

The opinion of the Court of Appeals for the Sixth Circuit, printed as Appendix B, *infra*, is reported at 283 F2d 61.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was dated and entered on October 19, 1960 (Appendix D, *infra*).

The jurisdiction of this court is invoked under *28 USC* §1254(1).

QUESTIONS PRESENTED

I

Will the trial of a civil action for damages presided over by a judge who—

a) has stated that he would not believe the plaintiff under oath;

b) at the disqualification hearing accused the plaintiff of falsehood;

c) at the disqualification hearing accused one of plaintiff's attorneys of falsehood;

d) has threatened one of plaintiff's attorneys with "difficulty" in the trial of the case;

e) has threatened plaintiff's other attorney with "embarrassment" in the trial of another case;

f) has a personal friendship, and a social, political and fraternal relationship with three defendants who are also defense attorneys in the case;

g) has received secret briefs from one or more of said three defendants about the case;

h) uses one of these three defendants as a courier to carry his communications to one of plaintiff's attorneys;

i) accepted an invitation from one or more of these three defendants to be a featured speaker at a bar gathering where the judge was to be on the program with these and other defendants;

j) after denying the motion for his disqualification, summarily convicted and sentenced both of plaintiff's attorney for contempt of court;

k) based his decision denying plaintiff's motion for disqualification at least in part upon the alleged falsity of plaintiff's affidavit of personal bias or prejudice;

l) at the disqualification hearing agreed on the record with the allegations of counter affidavits filed by the three defendants, which counter affidavits denied material allegations of plaintiff's affidavit of personal bias or prejudice;

m) held that plaintiff by filing motions and demanding a jury trial prior to the assignment of said judge to the case had waived his right to disqualification—

accord plaintiff due process of law under the Fifth Amendment to the United States Constitution?

II

Was the affidavit of personal bias or prejudice legally sufficient?

III

May a refusal to disqualify be reviewed by petition for writs of mandamus and prohibition?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The various constitutional provisions and statutes involved in this case are set out in Appendix E, *infra*.

STATEMENT

A. The basic facts.

The principal issue here is just how biased or prejudiced a judge must be before it is his duty to disqualify himself from presiding over the trial of a case. The secondary issue is whether a refusal to disqualify may be reviewed by petition for writs of mandamus and prohibition, or whether the whole case must be tried and then appealed before such preliminary issue can be determined.

On April 8, 1960, petitioner as plaintiff filed a complaint in Civil Action No. 736 in the United States District Court for the Western District of Michigan, Northern Division, located at Marquette, charging four attorneys, seven hospital trustees, seventeen doctors comprising the "medical

staff" of a hospital, and others, with interfering with and attempting to destroy his medical practice and with having performed certain acts toward that end to plaintiff's damage. On April 22, 1960, petitioner as plaintiff filed an amended complaint in said civil action as of right. On May 3, 4 and 17, 1960, motions to dismiss, for a more definite statement and for a more specific complaint were filed in behalf of various defendants. On May 9, 1960, a motion for leave to file a second amended and supplemental complaint and a motion for temporary injunction were filed in behalf of petitioner as plaintiff. On June 2, 1960, petitioner as plaintiff filed a demand for jury trial.

There are two judges of said court—Chief Judge Raymond W. Starr and Judge W. Wallace Kent.

By letter dated June 7, 1960, Judge Kent informed all counsel in the case that a hearing on all motions on file had been set for August 1, 1960, and that briefs in support of and in opposition to the motions were to be filed with the court in Grand Rapids on or before July 1, 1960, thus indicatinng that he had been assigned as judge of said cause.

Judge Kent is disqualified to preside over any matter connected with said Civil Action No. 736 by reason of personal bias or prejudice. Not wishing to waive such disqualification, petitioner's attorneys in the case refrained from filing any briefs after having been informed that Judge Kent was assigned to the case.

On July 13, 1960, Judge Kent telephoned long distance to one of petitioner's attorneys in Port Huron relative to briefs and, when requested to step out of the case, informed said attorney that a motion for disqualification was in order. Pursuant to *28 USC* §144 an affidavit of personal bias or prejudice was executed by petitioner as plaintiff in

said civil action, duly certified by his attorneys and filed in Marquette on July 18, 1960, as part of a motion for the disqualification of Judge Kent. The motion was noticed for hearing at the opening of court on August 1, 1960.

The affidavit of personal bias or prejudice charged that Judge Kent had a personal bias or prejudice in favor of three of the defendants in said civil action, which defendants are attorneys, each of whom representes himself and one or more of the defendant doctors. The affidavit further charged that Judge Kent had a personal bias or prejudice against petitioner as plaintiff in said civil action.

Among other things the affidavit stated that Judge Kent —(a) had stated that he would not believe plaintiff under oath; (b) had threatened one of plaintiff's attorneys with "difficulty" in the trial of the case; (c) had threatened the other attorney of plaintiff with "embarrassment" in the trial of another case; (d) had a personal friendship, and a social, political and fraternal relationship with the three defendants in the case who are attorneys and represent themselves and the defendant doctors; (e) had received secret briefs from one or more of these three defendants about the case; (f) used one of the three defendants as a courier to carry his communications to one of plaintiff's attorneys; and (g) had accepted an invitation from one or more of the three defendants to be a featured speaker at a bar association meeting where the judge was to be on same program with the defendant doctors.

A counter affidavit alleging at least partial falsity of plaintiff's affidavit of personal bias or prejudice was filed by each of the three attorney-defendants in behalf of himself and his clients.

On August 1, 1960, Judge Kent found the affidavit of personal bias or prejudice legally insufficient and materially false, and denied the motion for his disqualification.

During the course of the hearing on the motion for disqualification Judge Kent accused one of plaintiff's attorneys of falsehood. He also agreed, at least partially, with statements made by one or more of the three attorney-defendants either in open court or in one or more of the counter affidavits.

Shortly after his decision on the motion for disqualification Judge Kent summarily convicted and on the following day (August 2, 1960) sentenced both of plaintiff's attorneys for criminal contempt of court, after having denied the request of their newly acquired counsel for (a) a continuance until he could procure a transcript of the contempt proceedings, (b) the assignment of another judge to the contempt proceedings, and (c) a reconsideraiton of the contempt adjudications.

On August 15, 1960, petitioner as plaintiff filed with the United States Court of Appeals for the Sixth Circuit a petition for writs of mandamus and prohibition requiring Judge Kent to certify his disqualification and restraining him from proceeding further with Civil Action No. 736.

On August 29, 1960, the Court of Appeals for the Sixth Circuit issued its order to show cause why the writs should not issue. On September 15, 1960, an "answer" to the petition for writs of mandamus and prohibition was filed by the three attorney-defendants mentioned above and another attorney-defendant. The four attorneys stated in their "answer" that they represented the District Court and Judge Kent. Attached to this answer were copies of the

counter affidavits and a partial transcript of the proceedings had before Judge Kent on August 1 and 2, 1960, the transcript of most of the criminal contempt proceedings being omitted.

On October 19, 1960, the Court of Appeals rendered its opinion, set forth in full in Appendix B and reported in 283 F2d 61, holding that mandamus and prohibition would not lie to review Judge Kent's refusal to disqualify himself, and also holding that the affidavit of personal bias or prejudice was legally insufficient. The petition for writs of mandamus and prohibition was dismissed.

BASIS OF FEDERAL JURISDICTION

Federal jurisdiction in the court of first instance was based upon the fact that Civil Action No. 736 arose under the Constitution and laws of the United States, the amount in controversy exceeded $10,000.00 exclusive of interest and costs, and the District Court had jurisdiction thereof under 15 *USC* §§1, 2, 15 and 26, *42 USC* §§1981, 1982, 1983, 1985, 1986 and 1988; *28 USC* §§1331, 1337 and 1343, and §1 of the Fourteenth Amendment to the United States Constitution.

REASONS FOR GRANTING THE WRIT

A. The Court of Appeals has decided an important federal question in a manner in conflict with the applicable decisions of this court. This is that due process is not denied by requiring a litigant to try his case before a prejudiced judge so long as the question of prejudice may be determined on appeal after the trial. This begs the question, for if the judge later be determined prejudiced the litigant has been denied due process. In effect the Court of

Appeals, has said to petitioner, mandamus and prohibition are not the proper remedies; the question of disqualification may only be determined on appeal after the trial. Then, by its *obiter dicta* it has also warned petitioner that the affidavit of personal bias or prejudice is insufficient, thus informing him that he can get nowhere on appeal. It is submitted that such holding is in direct conflict with the decisions of this court in *Offutt v. United States*, 348 US 11, 14, that "justice must satisfy the appearance of justice," and *Re Murchison*, 349 US 133, 136, that "A fair trial in a fair tribunal is a basic requirement of due process • • • 'every procedure which would offer a possible temptation to the average man as a judge • • • not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.'" Although these were criminal cases, due process of law is equally applicable to civil suits.

B. The Court of Appeals has decided a federal question in a way in conflict with the applicable decision of this Court. It has done so by holding the affidavit of personal bias or prejudice legally insufficient although the affidavit fully meets the requirements of 28 *USC* §144 as interpreted by this Court in *Berger v. United States*, 255 US 22, because it sets forth "the reasons and facts for the belief the litigant entertains • • • [which] • • • give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." *Berger v. United States*, 255 US 22, 33, 34.

C. The Court of Appeals for the Sixth Circuit has rendered an opinion in conflict with decisions of the Courts of Appeals of the Second, Fifth, Sixth and Ninth Circuits. These courts have held that the ruling on a motion for dis-

qualification could be reviewed by mandamus or prohibition in advance of a trial on the merits, viz:

Second Circuit

In re Lisman, 89 F2d 898 (CA2, 1937);

Foster v. Medina, 170 F2d 632 (CA2, 1948), certiorari denied 1949, 335 US 909;

Fifth Circuit

Henry v. Speer, 201 F 869 (CA5, 1913);

Sixth Circuit

Williams v. Kent, 216 F2d 342 (CA6, 1954);

Ninth Circuit

Connelly v. United States District Court, 191 F2d 692 (CA9, 1951);

Gladstein v. McLaughlin, 230 F2d 762 (CA9, 1955).

Also, see *Cuddy v. Otis*, 33 F2d 577 (CA8, 1929). This case was decided in the same circuit which later decided *Minnesota & Ontario Paper Co. v. Molyneaux*, 70 F2d 545 (CA8, 1934), which, in the language of District Judge Merrill E. Otis of the Eighth Circuit in *United States v. Murphy*, 19 FS 987, 989, "goes far to justify the use of" mandamus as a method of reviewing disqualification rulings in advance of trial.

In the *Gladstein Case* (230 F2d 762, 763) the Ninth Circuit Court of Appeals held the affidavit sufficient to disqualify the judge in a proceeding for leave to file petition for mandamus, prohibition or other order directing the District Judge to disqualify himself. The respondent judge

contended that the sufficiency of the affidavit should be considered only on appeal and not in the proceedings seeking mandamus. Of this the Court of Appeals said (p. 763):

> "That is to say that we should then consider the record made up by a judge we know to be prejudiced and which well could be infected with his prejudice and thereby cast unjust reflection on Gladstein prejudicial to his further employment.
>
> We do not agree that Gladstein should be put to the time and expense of such proceeding. * * *"

In *Green v. Murphy*, 259 F2d 591 (CA3, 1958), three of the seven judges of the Court of Appeals for the Third Circuit held that the refusal of a district judge to disqualify himself might be reviewed before trial upon mandamus or prohibition.

ARGUMENT

A. The petitioner's right to practice medicine is a property right.

> "* * * the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment * * *." *Greene v. McElroy*, 360 US 373, 492.

Likewise his right to sue for damages done to his practice and to protect his practice from further interference is a property right.

A right of action to recover damages is property. *Angle v. Chicago, St. P. M. & O. R. Co.*, 151 US 1, 19.

The Fifth Amendment relevantly provides: "No person • • • shall • • • be deprived of • • • property without due process of law."

In the case of *Re Murchison*, 349 U. S. 133, 136, this court relevantly stated (emphasis supplied):

> "*A fair trial in a fair tribunal is a basic requirement of due process.* Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that '*every procedure which would offer a possible temptation to the average man as a judge • • • not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.*' *Tumey v. Ohio*, 273 US 510, 532, 71 L ed 749, 758, 47 S Ct 437, 50 ALR 1243. *Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.* But to perform its high function in the best way 'justice must satisfy the appearance of justice.' *Offutt v. United States*, 348 US 11, 99 L ed 11, 75 S Ct 11."

In *National Labor Relations Board v. Ford Motor Co.*, 114 F 2d 905, 909 (CA 6, 1940), certiorari denied 312 US 689, the Court said:

> "We may accept as fundamental, the axiom that a trial by a biased judge is not in conformity with due process of law."

It follows, that a trial of a damage suit presided over by a biased judge would deprive petitioner of property without due process of law.

Would a trial presided over by a judge who—

a) has stated that he would not believe the plaintiff under oath;

b) has accused the plaintiff of falsehood;

c) accused one of plaintiff's attorneys of falsehood;

d) has threatened one of plaintiff's attorneys with "difficulty" in the trial of the case;

e) has threatened plaintiff's other attorney with "embarrassment" in the trial of another case;

f) has a personal friendship and a social, political and fraternal relationship with three defendants who are also defense attorneys in the case:

g) has received secret briefs from one or more of said three defendants about the case;

h) uses one of these three defendants as a courier to carry his communications to one of plaintiff's attorneys;

i) accepted an invitation from one or more of the three defendants to be a featured speaker at a bar gathering where the judge was to be on the program with these and other defendants;

j) after denying the motion for his disqualification, summarily convicted and sentenced both of plaintiff's attorneys for contempt of court;

k) based his decision denying plaintiff's motion for disqualification at least in part upon the alleged falsity of plaintiff's affidavit of personal bias or prejudice;

l) at the disqualification hearing agreed on the record with the allegations of counter affidavits filed by the three defendants which counter affidavits denied material allegations of plaintiff's affidavit of personal bias or prejudice;

m) held that plaintiff by filing motions and demanding a jury trial prior to the assignment of said judge to the case had waived his right to disqualification—

violate due process?

We respectfully urge that the answer to this question is "Yes."

When Judge Kent determined that material allegations in the affidavit of personal bias or prejudice were false he was, in effect, calling the plaintiff a liar. He was, moreover, doing more than this. The three defendant-attorneys had filed counter affidavits alleging that the affidavit of personal bias or prejudice was false as to material allegations, and this position was presented by two of them orally at the hearing. Thus, when Judge Kent was determining that the affidavit of personal bias or prejudice was false, he was in fact determining also the truth of the counter affidavits and the argument made by two of the defendant-attorneys. He was, in effect, saying "you [defendants] are telling the truth while he [plainti] lies." The parties to the litigation were from that moment placed in separate categories and in unequal positions not contemplated or permissible in a fair trial before an impartial tribunal. No later than that moment the tribunal became partial.

Civil Action No. 736 charges a conspiracy among the defendants to interfere with, discharge, devalue and destroy plaintiff's practice as a physician and surgeon. Were Judge Kent to preside over the trial of this case, oversee the selection of a jury, determine questions of evidence (many of which depend upon facts), pass upon motions to dismiss based upon the failure to state a cause of action, or pass upon motions for direction of verdict based on lack of a jury question, or failure to meet the burden of proof, defendants would be favored with a presumption of truth while Judge Kents' determination that plaintiff and at least one of his attorneys are liars would prove a heavy burden for plaintiff to overcome.

Who would seat a juror of the bent of mind exhibited by Judge Kent? The test of bias or prejudice is the same for judge as for juror.

We respectfully urge that due process requires that Judge Kent disqualify himself and call in another judge to preside over Civil Action No. 736.

B. The affidavit in *Berger v. The United States*, 255 US 22, 28, 29, asserted that some of the defendants (who were charged with espionage) were of German and Austrian extraction and that the trial judge had made certain derogatory statements indicating his dislike of Germans and German-Americans generally. Of the affidavit of personal bias or prejudice this court said (pp. 33, 34):

> "Of course, the reasons and facts for the belief the litigant entertains are an essential part of the affidavit, and must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment. The affidavit of defendants has that character."

We respectfully submit that the affidavit of personal bias or prejudice in Civil Action No. 736 gives fair support to the charge of a bent of mind which might prevent or impede impartiality of judgment on the part of Judge Kent, and is legally sufficient to require his disqualification.

C. Judge Kent made an issue of the truth of petitioner's affidavit of personal bias or prejudice.

This court said in *Berger v. United States*, 255 US 22, 36:

> "To commit to the judge a decision upon the truth of the facts [alleged in the affidavit] gives chance for the evil against which the section [28 USC §144] is directed. The remedy by appeal is inadequate. It comes after the trial, and if prejudice exist, it has worked its evil, and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient."

What law is it that would compel a plaintiff to try a damage suit before a biased judge in violation of the Constitution of the United States and, perhaps after an adverse decision by judge or jury or perhaps after having received a verdict of pennies instead of dollars, then require such plaintiff to take an appeal for the sole or chief purpose of determining whether the judge was biased and should have presided at the trial?

28 USC §1651(a) authorizes:

> "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

On the question of reviewing denial of a motion for disqualification by mandamus or prohibition the Court of Appeals for the Ninth Circuit in *Connelly v. United States District Court*, 191 F 2d 692, 693 (CA 9, 1951), said in a footnote:

> "The respondent judge has not questioned the power of this court to issue its writ of mandamus or prohibition to prevent him from exercising any jurisdiction over the petitioner, if a proper showing of his prejudice has been made. As stated by the Supreme Court in *Berger v. United States*, 255 U.S. 22, 36, 41 S. Ct. 230, 234, 65 L. Ed. 481: '*The remedy by appeal is inadequate.* It comes after the trial and if prejudice exist it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient.' (Emphasis supplied.) In the Berger case the issue of the sufficiency of the affidavit was decided on appeal. The writ of prohibition aids this appellate jurisdiction of ours by preventing a useless appeal in the event of the conviction in a prosecution presided over by a trial judge exercising a jurisdiction he does not possess. In *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 23, at page 26, 63 S. Ct. 938, at page 941, 87 L.Ed. 1185, the Supreme Court states: 'The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been *to confine an inferior court to a lawful exercise of its prescribed jurisdiction* or to compel it to exercise its authority when it is its duty to do so. *Ex parte Peru supra*, [318 U.S. 578, 584], 63 S.Ct. 793, [87 L.Ed. 1014] and cases cited; *Ex parte Newman*, 14 Wall. 152, 165-166, 169, 20 L.Ed. 877; *Ex parte Sawyer*, 21 Wall. 235, 238, 22 L.Ed. 617; *Interstate Commerce Comm'n v. United States ex rel. Campbell*, 289 U.S. 385, 53

> S.Ct. 607, 611, 77 L.Ed. 1273.' (Emphasis supplied.) The writ is particularly applicable in such a case as this where, as the Berger case states, 'The remedy by appeal is inadequite.'"

We respectfully submit that review of the refusal to disqualify by petition for mandamus and prohibition is permissible under *28 USC* §1651(a) "agreeable to the usages and principles of law." If the affidavit of personal bias or prejudice is sufficient, and we believe it is if tested by the decision in *Berger*, or if the Constitution would be violated by trial before a prejudiced judge, it follows that it is the duty of such judge to certify his disqualification. According to the usages and principles of law the performance of that duty may be compelled by a Court of Appeals. It is likewise the duty of such judge to refrain from proceeding further with the case in question, and the performance of such duty may be required by writ of prohibition agreeable to the usages and principles of law.

The Court of Appeals held (283 F2d 62, with emphasis supplied):

> "Mandamus does not lie to compel a judge of an inferior court to reverse a decision made by him in the exercise of *a legitimate jurisdiction*," citing *Ex parte Flippin*, 1876, 94 US 348.

The relevant jurisdiction of Judge Kent was limited to passing upon the sufficiency of the affidavit as a matter of law. *Berger v. United States*, 255 US 22. In passing upon the truth or falsity of the affidavit of personal bias or prejudice Judge Kent was not "in the exercise of a legitimate jurisdiction." In passing upon the truth or falsity of the affidavit he was exceeding his jurisdiction, abusing any discretion he might have had and acting in direct contravention of the *Berger Case* (255 US 22, 36), in which this court said:

> "To commit to the judge a decision upon the truth of the facts gives chance for the evil against which the section is directed. The remedy by appeal is inadequate. It comes after the trial, and if prejudice exist, it has worked its evil, and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient."

To say, as the Court of Appeals did, that petitioner's remedy in this case is by appeal is in direct conflict with the quoted language of this court in the *Berger Case*. If, under such circumstances, the remedy by appeal was inadequate in the *Berger Case*, how much more inadequate is it in this case in which the Court of Appeals has already stated that the affidavit is insufficient and therefore an appeal will be futile.

Under these circumstances the remedy by appeal is meaningless, and petitioner now has no adequate method of reviewing Judge Kent's decision other than by the method chosen.

We respectfully submit that Judge Kent's denial of the motion for his disqualification was properly reviewable by petition for writs of mandamus and prohibition.

We also submit that the Court of Appeals erred:

1. In its decision of the due process question.

2. In deciding that the affidavit of personal bias or prejudice was insufficient.

3. In deciding that mandamus and prohibition were not the proper remedies to compel a judge to disqualify himself and to restrain him from proceeding further in a case.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

OPINION OF THE DISTRICT COURT

It requires, therefore, that the court should analyze the affidavit and point out that it does or does not carry sufficient allegations to justify a disqualification.

Before starting on that, we should point out that a jury trial demand was filed by the plaintiff in this case on June 2, 1960. We should also point out that this case has been pending since the 8th of April; that both the defendants and the plaintiff have sought relief from the court, plaintiff's motions having been filed on the 9th of May, 1960, some two months before the affidavit was filed.

As to the affidavit, by paragraphs, it recites that Samuel G. Albert is the plaintiff, which he is.

It recites that this court has indicated to Mr. Bradt that he has been assigned to hear motions in and try this case, and recites that the judge has a personal bias or prejudice.

All cases arising in the Northern Division, as Mr. Albert knows, are tried by this judge. As to any bias or prejudice, that will be covered as we go through the affidavit and take it up paragraph by paragraph.

Paragraph 3 recites the persons whom Charles M. Humphrey, Jr., represents.

Paragraph 4 recites the persons whom William F. Pellow, represents.

Paragraph 5 recites the names of the persons whom Ivan D. Wright represents.

Paragraph 6 recites that Mr. Humphrey, Mr. Pellow, and Mr. Wright "presently enjoy and for a number of years have enjoyed an extensive legal practice in the court of said judge, while my attorney, Theodore G. Albert, who is my brother, has had a total of four cases in said court including my own case and has met with said judge upon only three occasions, while my other attorney, Peter E. Brad', has never practiced in said court prior to the commencement of this case and has only this case pending in said court, and has never met said judge."

May I say, as to paragraph 6, that the fact that counsel does or does not have a practice of consequence in a court is not sufficient to establish prejudice or bias on the part of the judge of that court, either for or against that attorney.

Paragraph 7: "Defendants Charles M. Humphrey, Jr., William F. Pellow and Ivan D. Wright, hereinafter referred to as 'said defendants', are the personal friends of said judge and have been for some time, and enjoy social and professional contacts with said judge of a far more intimate nature than the ordinary attorney-judge relationship."

Assuming, as we must do, if I did not point it out, the truth of each and every allegation contained herein, the fact that the defendants, if they were, were personal friends of the judge would not be sufficient, under the decisions, to constitute bias or prejudice on the part of the judge in regard to the justiciable matter then pending or here pending.

Paragraph 8 recites that "Said judge belongs to (26) the same political party as said defendants and both said judge and said defendants took prominent part in the af-

fairs of said political party prior to the time said judge was appointed to the bench by a member of such political party"; by whom, we assume, is meant the President of the United States, Mr. Dwight D. Eisenhower. "In connection with the affairs of said political party, said defendants and said judge became acquainted and such acquaintance has continued through the present time. Said judge frequently dines with said defendants when he is holding court in the Northern Division of his district, and he frequently entertains said defendants in his chambers behind closed doors in said division."

Assuming, as we must, that the defendants and the judge belong to the same political party, and assuming that the laws which prevent the judges of the courts of the United States from being active in politics do not apply, and assuming that both the judge and the defendants took prominent part in the affairs of the political party prior to the time of the appointment, that would not constitue personal bias or prejudice. That is not a fact upon which bias or prejudice can be based. The fact, as recited, that the judge may have become acquainted with said defendants in connection with such political party, which acquaintance has continued through the present time, would not constitute bias (27) or prejudice.

The error in connection with the last statement is one which is frequently made because of a desire to avoid any outright statements which are untrue. It merely recites, generally, that the judge frequently dines with defendants when he is holding court in the Northern Division. It does not recite that they are private or social dinners.

It recites that he frequently entertains the defendants in his chambers behind closed doors; and even this court has no conception of what is meant by the affidavit when it uses

the word "entertains". I assume that they are not suggesting that this court includes, in the supplies in its chambers, any alcoholic beverages or food or cooking facilities. So I assume that what it must refer to is private conferences with members of the bar in the chambers of the court, which occurs in every court in the United States, and would not constitute a basis—as would nothing else in paragraph 8—for a finding of a personal bias or prejudice.

Paragraph 9 refers to a letter, a personal letter, to the judge about the case without the knowledge of counsel, to which letter said judge replied by a letter dated July 12, 1960, attached as Plaintiff's Exhibit "A", in which reply said judge addressed said defendant Ivan D. Wright as "Dear Ivan".

(28) The answer to plaintiff's affidavit is contained in the exhibit which is a part of the affidavit, wherein it shows at the bottom of the letter: "copy to Peter E. Bradt, Theodore G. Albert, Myron A. McMillan, Charles M. Humphrey, Jr., William P. Pellow".

Now, perhaps it would be better, although I am not stating this as a conclusion, if the court were at all times more formal in the manner in which it addressed attorneys who practice before the court. However, how anyone could object to a letter addressed in that fashion, a copy of which was forwarded to each of the other counsel, is beyond the comprehension of this court; and we rule that such letter is not sufficient, nor are the allegations of paragraph 9 sufficient, to show any personal bias or prejudice in regard to the justiciable matter now pending before the court.

Paragraph 10 says that "Said friendship between said judge and said attorneys is of such a nature that my attorney, Theodore G. Albert, has received communications and

instructions from said judge through defendant Ivan D. Wright who had received the same through direct communication with said judge."

What Mr. Albert may have received from Mr. Wright is a matter which is entirely outside the knowledge of the judge, and is not something which is attributable to, nor (29) could in any sense be charged to, the judge. It is nothing but hearsay.

Paragraph 11, paragraph 12, paragraph 13, and paragraph 14 refer to the Upper Peninsula Legal Institute and an invitation which has been extended to and accepted by the judge of this court to speak at that Upper Peninsula Legal Institute.

It recites the fact that certain attorneys, some of whom are parties, are members of a committee in regard to the institute, which, as shown, is sponsored by the State Bar of Michigan, of which every attorney in this room is a member; that it will be presided over by Mr. David E. McDonald, who is president of the Gogebic-Ontonagon Bar Association and a partner of Charles M. Humphrey, Jr., and a former associate of Ivan D. Wright; and it covers something in regard to the program. It states that Mr. McDonald is a close personal friend of the judge, and is also the United States Commissioner.

It recites that the plaintiff's brother was a member of the committee, he has never been notified of any meetings, and did not know in advance of the doings of the committee in the premises.

It goes on to recite the program, and the fact that in part of it, the judge's name was not included; and then there is some innuendo by the quotation that the court "will (30) mingle with 'Dear Ivan' D. Wright; William F.

Pellow and Charles M. Humphrey, Jr., and at least some of the seventeen defendants who are doctors."

One of the Justices of the Supreme Court of the United States is chairman of the section on Judicial Administration of the American Bar Association, and as such will attend the meeting of the American Bar Association at the end of this month and will necessarily be thrown in company with lawyers. It may be that, based upon the suggestions, and only suggestions, costained in this affidavit, that will mean the Justice who is chairman of that section would then be required to disqualify himself from any and every case in which any one of those attorneys was a party or in which any one of those attorneys was a counsel.

It is also common knowledge on the part of all lawyers that representatives of the British Government will be guests at that conference. It is common knowledge that the Chancellor of the Exchequer, a member of the British Cabinet, will be a guest at that conference. It has also been published and is known to the public that certain representatives of that government will be entertained by the Chief Justice of the United States while in attendance at that conference. We assume, from that, that plaintiff and his counsel would suggest that the Chief Justice would thereafter be disqualified in any case in which the British Government had any interest.

The court is satisfied that paragraphs 11, 12, 13, and 14 do not contain any allegations which would justify the court in concluding that there was any personal bias or prejudice for the defendants or against the plaintiff.

Paragraph 15 recites that the defendant Ivan Wright is and has been for the past ten or twelve years the district manager of the member of congress from this district, in-

cluding the county wherein the defendants reside; that they are all of the same political faith, if that term fits politics. "Faith," in this court's opinion, applies only to religion. It may be that politics, to some people, are so strong as to constitute a religion. There is no allegation that that is true either of the judge of this court or any of the parties to the action. It recites that defendant Wright and the congressman were consulted concerning, and did recommend, his appointment as such judge.

There is nothing to indicate that the judge had any knowledge of that fact then or now, that he solicited their recommendation, that he knew anything about it; and it would, therefore, not constitute any basis for personal bias or prejudice.

Paragraph 16 refers to certain statements by the defendant Iyan Wright, which are not attributable and cannot be charged to the court.

Paragraph 17 refers to the fact that this is a conspiracy case. Perhaps it should be read:

> "I am informed by my counsel that in a conspiracy trial the scope of judicial discretion, particularly on matters dealing with the introduction of evidence is much broader than in the ordinary trial. I am further informed by my counsel that it is the function of said judge to decide motions now pending in my case which may result in the dismissal of said cause as to some of the defendants, and to decide all questions relating to the selection of an impartial jury and to decide whether or not said case ever goes to a jury, as well as to decide whether I am telling the truth in the testimony which I will give in said case or whether his friends the said defendants and such other of the defendants

as may become his friends as the result of his consorting with them at said institute, are telling the truth in those instances in which our testimony will conflict. I know that there will be practically a 100% conflict between my testimony and that of said defendants."

Do I understand, Mr. Bradt, that this plaintiff has been informed that the determination of the credibility of witnesses is a matter for the court to determine in a jury trial?

Mr. Bradt: Yes, your Honor.

The Court: He has?

(33) Mr. Bradt: Yes.

The Court: Sit down. It is an improper statement of the law. The question of the credibility of witnesses is with the jury. It is a matter which is confided strictly to the jury.

Mr. Bradt: Your Honor—

The Court: Sit down.

Paragraph 17 does not set forth any basis for any finding of any personal bias or prejudice on the part of the judge of this court.

Paragraph 18 relates to the position of the judge as a member and chief officer of the Masonic organization in this state, to which position he was elected since the commencement of this lawsuit by his brother members, including said defendants.

There is no allegation that the court does or does not know, or did or did not know, of the membership of the defendants in the organization to which he belongs.

Paragraph 19 has reference to the canons of ethics for counsel.

Paragraph 20 has reference to the canons of judicial ethics.

Paragraph 21 recites that the conduct of the defendants violates Canon 3, and that they will, if permitted, violate Canon 19, and that the court has failed to criticize (34) or correct violations of Canon 3, without setting forth what the violations have been. It sets forth nothing except a conclusion that there has been or will be a violation of the canons of ethics.

Paragraph 21 goes on in regard to a certain telephone conversation and the fact that the court may have received briefs from counsel which were not transmitted to counsel for the plaintiff.

There is nothing in such allegation to indicate that the court had any knowledge that they had not been transmitted to counsel for the plaintiff. Whether they had been exchanged or not is a matter that is of no consequence, since if plaintiff's counsel had called it to the court's attention, it was a matter that could have been cured.

It also carries a conclusion that the court has violated Judicial Canon No. 33 by his friendship with the members of the bar.

Paragraph 22 has reference to another case, has nothing to do with anything other than certain letters which are a part of the record, and relates to the manner in which the court handled a case in which this plaintiff was not involved to which he was not a party, and a case to which none of the defendants were parties so far as the court knows, and is of no consequence.

Paragraph 23 refers to a telephone conversation (35) between the judge and one of the attorneys for the plaintiff which would not demonstrate any personal bias or prejudice against the plaintiff, and would relate only to the relationship between the court and a member of the bar who had failed to comply with a request from the court.

Paragraph 24 refers to the custom or rule of this court, not published, of which Mr. Albert was well aware, prohibiting oral argument on a motion in said court when a brief had not been filed; and recites that the rule, in fact, has never been adopted by said court.

Paragraph 25 is a conclusion, not a fact, by the affiant that any personal bias or prejudice which the court has against attorneys for the plaintiff will necessarily rub off on the plaintiff, and contains no statements of fact.

Paragraph 26 recites that the affidavit is filed in good faith.

Paragraph 27 is the conclusion by the plaintiff that the court could not fairly and impartially pass upon the credibility of the testimony of the parties even if the court had no bias or prejudice, which is not a basis for finding since it rests upon a conclusion that there is no bias or prejudice.

Paragraph 28 is a request that "another judge be designated in my case," which is denied.

Now, in fairness to all, the court having denied the motion, perhaps it would be well if we go through this affidavit, which we feel we are justified in doing.

Paragraph 6 refers to the practice of the parties, and the number of cases handled by respective counsel.

It is perfectly true that Mr. Humphrey and Mr. Wright have had a number of cases in this court. I think Mr. Humphrey has actually tried three or four, I don't recall; but that, I would say, is close enough. Mr. Wright may have tried an equal number. I don't recall that Mr. Albert has tried any in the court; I think they have been settled. Mr. Bradt has never appeared in this court before.

Paragraph 7 recites that the defendants Charles Humphrey, Jr., William F. Pellow, and Ivan D. Wright—and I might go back and refer to paragraph 6, that Mr. Pellow has enjoyed an extensive legal practice; If he has, it is without the knowledge of the court.

Paragraph 7 recites that the defendants Humphrey, Pellow, and Wright are personal friends of the judge and enjoy social and professional contacts with said judge of a far more intimate nature than the ordinary attorney-judge relationship.

Probably the best thing that could be used to describe the truth of that paragraph would be to state that to the best of my knowledge, I have never seen Mr. Pellow (37) until he sat at this counsel table today and I was unable to identify him. I have known Mr. Humphrey and Mr. Wright since I was appointed to this court and first came to the Northern Division. To the best of my knowledge, I have never had any social or professional contact with them outside of the activities of this court—

Mr. Bradt: May it please the Court: As your Honor knows, you can't question the truth of the affidavit, which is exactly what you are doing by reading into the record what you are saying.

The Court: I have already ruled on the motion, Mr. Bradt.

Mr. Bradt: What you are doing today—

The Court: Will you be seated until I am through?

Mr. Bradt: Will you excuse me, your Honor, from further participation in this case?

The Court: No.

(Mr. Bradt withdrew from the counsel table.)

The Court: Mr. Russell, will you see that Mr. Bradt remains at the counsel table.

Mr. Bradt, if you leave this courtroom, you are going to be in contempt of this court.

All right, Mr. Russell.

(Mr. Albert withdrew from the counsel table.)

The Court: Mr. Albert.

(38) (Mr. Bradt and Mr. Albert withdrew from the courtroom.)

The Court: Mr. McDonald, as a member of the bar, would you ask Mr. Albert to return to the courtroom, please?

Mr. John E. McDonald: I will, your Honor, except that I don't know Mr. Albert.

The Court: Mr. Albert is the dark gentleman sitting in the first chair, who left last. It will be appreciated.

(Mr. McDonald withdrew from the courtroom, returning shortly.)

Mr. McDonald: He asked me to inform you that he will not return.

The Court: All right, we will recess.

(A recess was taken. Proceedings were then had in Criminal Action 3661, In re Theodore G. Albert, and Criminal Action 3663, In re Peter Bradt.

Thereupon, proceedings in this matter were resumed, all counsel being present.)

The Court: Now in regard--

Mr. Bradt: May I say a word?

The Court: Yes.

Mr. Bradt: Not as a prisoner, your Honor.

As attorney for the plaintiff, we have no motions that we are asking your Honor to grant. I have no authority (39) from the plaintiff to remain for consideration of the further motions.

I will make this one motion of you, and that is that you delay proceedings in this case until we have an opportunity

to have your Honor's decision on the motion for disqualification reviewed by application for mandamus and prohibition, which we have ready to file in Cincinnati.

The Court: Mr. Bradt, according to the sheet which has been given to me, without going through the file, there is on file plaintiff's notice of hearing on a motion for leave to file and serve a second amended and supplemental complaint.

Mr. Bradt: Yes, your Honor, and because of the fact that there is some case law on waiver which I thought your Honor had alluded to, perhaps indirectly, a little earlier, we are not asking your Honor to give us any relief on those motions. We do not wish to waive this disqualification ground in any way whatsoever.

And now may I have, your Honor, permission to leave?

The Court: What are you going to do with the other motions? You have a notice in here for hearing on a motion for temporary injunction?

Mr. Bradt: Well, the next thing we are going to do is to apply for a review of your ruling on disqualification.

The Court: What you are asking is a stay of (40) execution until that is disposed of, or a stay of proceedings?

Mr. Bradt: Yes, your Honor.

The Court: But suppose it is denied?

Mr. Bradt: Well, then, I ask: Why should we deal in suppositions? I mean, you can answer that right now.

The Court: Suppose that the court is satisfied that the ruling on disqualification is not an appealable matter? And suppose we point out to you that—

Mr. Bradt: Well, we are right back here again. I don't care to disclose to your Honor and to the defendants exactly what I do propose to do at that time. But I will meet that when I come to it.

May I say one more thing, your Honor?

The Court: Yes.

Mr. Bradt: You said that I slammed my briefcase on the table, that I created a disturbance. That is not true. I did not slam my briefcase on the table. I went right down the aisle and right out. And if you say I refused to talk to you, that also is not true. I told the deputy marshal that I would not talk to you in chambers.

Now may I be excused?

The Court: When I get through.

Are you going to walk out again, Mr. Bradt?

Mr. Bradt: I am just going to sit back with the spectators, if I may.

(41) The Court: You may not. Mr. Bradt, we have some other matters here that have to be disposed of, and then the court is going to finish what it was doing.

What I would like to know is: Do you take the position that you have a right to an automatic stay of proceedings?

Mr. Bradt: No, your Honor.

The Court: I don't hear anybody back there. Step up to the counsel table, Mr. Bradt. You too, Mr. Albert.

Mr. Bradt: No, I don't, your Honor.

The Court: Do you take the position that there is in this court no discretion as to whether a stay of proceedings should be granted?

Mr. Bradt: I have said that, your Honor. Of course, I don't.

The Court: Then what do you expect us to do? You just walk out and we are supposed to leave those motions just hanging because you are not satisfied with what has been done on one motion which you filed?

Mr. Bradt: Well, your Honor and I had a telephone conversation in which you did not indicate that I had to be here at all today. When I twice suggested that perhaps

there was no point in my coming, you didn't say, "Well, you have to be there." Now, you can deal with those motions in my absence, I am sure.

(42) The Court: You are here.

Mr. Bradt: I am here.

The Court: You are an attorney for the plaintiff in this case.

Mr. Bradt: That is right.

The Court: Are you going to walk out while the court is hearing these motions?

Mr. Bradt: I would prefer not to be here when these motions are heard, your Honor.

The Court: Mr. Bradt, are you going to walk out while the court is hearing those motions?

Mr. Bradt: Well, I would like to walk out, yes, before your Honor starts with those motions.

The Court: Mr. Bradt, I suggest to you—this does not call for an answer—and also to Mr. Albert, that as men admitted to the bar, licensed to practice law in the State of Michigan, and admitted to practice before this United States District Court, you have some obligations to the court as well as to your client, which you seem to have overlooked; and I suggest that between now and tomorrow you start thinking about that.

Now, I don't know to whom either of you would talk, but I think it would be a good idea if you would discuss the matter with some counsel in whom you have great confidence between now and tomorrow, if possible.

(43) Now I am going to finish what I was saying in regard to the affidavit which is on file. Rather than place you gentlemen in an embarrassing position, if you would rather withdraw from the courtroom for the time being, the court will extend to you that privilege.

Mr. Bradt: Thank you, your Honor.

The Court: Immediately after I finish that, I am going to call the motions. If you are not here, I will know how to deal with you.

(Mr. Bradt withdrew from the courtroom.)

Mr. Albert: May I make a statement, your Honor; just one?

The Court: In regard to what, Mr. Albert?

Mr. Albert: I think that I have something to add concerning the waiver of our affidavit by the hearing on the motions. Mr. Bradt mentioned them; there are those cases—

The Court: Mr. Albert, if you will find some authority for that, immediately after I finish this I will be in chambers. If you have such authority, I certainly do not want to put you in the position of waiving anything. If you will come in and show me that authority, then we will not call the motions.

Mr. Albert: Your Honor, one further matter. If the court does not consider what we will show you as authority, we further want time, and I think it is not asking for (44) too much, to ask of the higher court—and I think there is authority there—that upon our filing of the petition for a writ of prohibition and/or mandamus, we get a stay of the proceedings in this entire matter. I think that that is not unreasonable, your Honor. And it isn't a matter of walking out on the motions. We are stating our reasons.

The Court: Come into chambers. We will take a recess in just a few minutes.

(Mr. Albert withdrew from the courtroom.)

The Court: Will you read my last statement in regard to the affidavit, please?

(The record was read as follows concerning paragraph 7 of the affidavit:

"Probably the best thing that could be used to describe the truth of that paragraph would be to state that to the best of my knowledge, I have never seen Mr. Pellow until he sat at this counsel table today and I was unable to identify him. I have known Mr. Humphrey and Mr. Wright since I was appointed to this court and first came to the Northern Division. To the best of my knowledge, I have never had any social or professional contact with them outside the activities of this court—")

The Court (continuing): —except on occasions when I have attended meetings of bar associations at which (45) they were present.

As to paragraph 8 relating to the political affiliations of the parties, it recites that "both said judge and said defendants took prominent part in the affairs of said political party prior to the time said judge was appointed to the bench by a member of such political party. In connection with the affairs of said political party, said defendants and said judge became acquainted and such acquaintance has continued through the present time."

The question of what is a prominent party is one in which we need not indulge. The record should show that in so far as the affairs of any political party, as I stated previously, I never knew either Mr. Wright or Mr. Humphrey until I was appointed to this court and made the first trip up here; I have never attended any political meetings, so far as I know, at which either of them was present or may have been there; and any acquaintance which I made was made in the course of the conduct of the affairs of this court.

It recites that "said judge frequently dines with said defendants when he is holding court in the Northern Division of his district, and he frequently entertains said defendants in his chambers behind closed doors in said division."

I have never dined privately with any of the persons whose names have been mentioned, so far as I can recall, (46) except for sitting in the same dining room; and I have never had dinner with any of these men except at a bar association meeting or some similar occasion. So far as entertaining the defendants in chambers behind closed doors, the only acquaintance I have had, or the only association, has been in connection with litigation pending in this court.

Paragraph 9 recites that "defendant Ivan D. Wright wrote a personal letter to said judge about my case without the knowledge of my attorneys," and attaches a copy.

The record should show that the letter of July 8 to which reference was made, if I recall correctly, had to do with the case of Villencia v. Red Owl, Inc.

Do you know if that is right, Mr. Wright?

Mr. Wright: That is correct, your Honor.

The Court: Which is Civil Action No. 700, pending in this division, set for hearing tomorrow. It was not a personal letter. It contained in it a question as to the manner in which—

Mr. Wright: If your Honor please, just a second. That letter that you are referring to there is the one where I wrote and asked if you intended to take testimony in the motions pending in the present case. You have the wrong letter.

The Court: There not being any question about it, the court replied, sending a copy to each of the other (47) counsel involved, stating that any oral testimony would be received at the time of the hearing on the motions. There is no need of reading it; it is in the file, attached to the affidavit.

Paragraph 10: "Said friendship between said judge and said attorneys is of such a nature that my attorney, Theodore G. Albert, has received communications and instructions from said judge through defendant Ivan D. Wright who had received the same through direct communication with said judge."

I have no idea what is being discussed there. As far as I know, all that happens is if the court has occasion to call one counsel in Ironwood and learns something about the case or has some information which requires a message, the court frequently will request that the information be transmitted to other counsel in Ironwood to avoid the necessity of further long-distance calls. Now, if that is a subject for criticism, then let there be criticism. I might say, however, that during that time we tried for a whole week to call Mr. Albert in his office, intermittently, not all the time, and we never were able to reach him.

Paragraphs 11, 12, 13 and 14 refer to the Upper Peninsula Legal Institute.

Perhaps we should say that the invitation extended to this judge to speak at the Upper Peninsula Legal Institute (48) came through a phone call from Mr. Milton Bachman, Secretary of the State Bar of Michigan. We had at that time no idea as to who would be present, except we assumed that most of counsel would be. We had no thought at all as to who might be on the committees, we were not informed; and certainly I cannot conceive of there being any objection to a Judge of the United States Court appearing at a legal institute for the attorneys in one of the divisions of that court for the purpose of discussing, in a paper, "Pre-Trial Conferences," thereby making an attempt to expedite the work of that court.

As to paragraph 15, it will probably come as a shock to some people, but so far as this court knows, Mr. John Bennett, a Member of Congress for this district, was not consulted in regard to the appointment of the judge of this court. To the best of our knowledge, we never saw, met, or knew anything about Mr. John Bennett, Member of Congress, until after being appointed and taking a greater interest in this territory. If Mr. Bennett, Member of Congress, and Mr. Wright were consulted in regard to the appointment, it was without the knowledge of the judge; and if it took place, it took place more than six years ago. The appointment is for life. It is not anything over which anybody can excercise any control at this time except the courts of appeal and the Congress of the United States in impeachment proceedings.

(49) Paragraph 16 states that Mr. Wright was known to make a comment, "We know him well," referring to the judge of this court.

Whether they know him well as an idividual is debatable. Whether they know him well as a judge is a matter of opinion. Where they remind plaintiff's brother of that fact, I don't know what it means.

As to the statement in paragarph 17, they have nothing to do with disqualification.

Paragraph 18: It is true that this judge is the Grand Master of the Grand Lodge of the Masons of Michigan, an organization having a membership of 175,000 or more in Michigan and between three and four million in the United States. It will probably come as a great surprise, but the actual election of the chief officer takes place when he is elected to the first office of the group of offices, which occurred in 1954. He progresses, then, onto other offices until

he becomes the chief officer for a short period of a year. He is elected by a group of 500 members, to which none of the attorneys in this group belong, so far as this court knows. As a matter of fact, we would be surprised if they even knew that we belonged to the organization; and if so, that we were head of the organization, except that they might have seen it in the newspaper.

As to any members of the bar who may or may not (50) belong to the Masons, I have no knowledge unless by some chance I should observe a pin or ring which would demonstrate that membership. I have never, so far as I know, attended a meeting, with one exception, in the Upper Peninsula; and so far as I know, none of these men have ever been present at any of those meetings. And as to their great influence, each of them contributes $1.50 a year toward the charitable program which is run on a state-wide basis, and $1.50 a year toward the general program of the organization; and to the best of my knowledge, none of them has ever contributed any substantial amount in addition thereto, although it is very possible it could be done without my knowledge, since I am not informed.

I might also say that the Chief Justice of the United States was formerly Grand Master of the Grand Lodge of California. Ex-President Harry Truman was formerly Grand Master of the Grand Lodge in Missouri. And I have no reason to suspect that it ever caused any disqualification of any of the people involved.

Paragraphs 19 and 20 refer to the canons of ethics, which the court does not feel are in any way applicable to this case.

Now, as to the receiving of briefs, to which reference is made in paragraph 21, where the briefs are not exchanged: It was the practice of Judge Fred M. Raymond, (51) who was a judge of this court for a number of years, to insist upon briefs from all counsel as to all questions raised. In some instances the briefs were exchanged and in some instances the briefs were not exchanged.

It has been the practice of this court, since Judge Raymond Starr came to preside in this court in 1946, for briefs to be filed in every matter which is before the court. In some instances the briefs are exchanged; in some instances the briefs are not exchanged.

If the court were having any secret briefs from anyone, the court would not have written, on July 12, 1960, to Mr. Ivan D. Wright with regard to the brief in question, pointing out a question as to the names of the persons for whom the brief was being written because of some conflict in the names, and sent a copy of it to each of the other counsel.

It has been the practice of this court, in the case of briefs on motions, to require that they be exchanged. We do not anticipate that there are reply briefs unless after both briefs.

It alleges that the court has violated Judicial Canon No. 33, which reads, in regard to social relations, in part:

> "* * * it is desirable that, so far as reasonable attention to the completion of his work will permit, he continue to mingle in social intercourse, and that he should not discontinue his interest in or (52) appearance at meetings of members of the Bar."

How we have violated 33, we don't know.

"He should, however, in pending or prospective litigation before him be particularly careful to avoid such action as may reasonably tend to awaken the suspicion that his social or business relations or friendships constitute an element in influencing his judicial conduct."

This action was filed on April 8. I can't remember when we left here in April, but it was about April 8. We next returned to the Upper Peninsula, where these defendants live, subsequent to the filing of this affidavit. We have had no social contact, so far as we know, with anyone from the Upper Peninsula since that time who is in any way, or has been in any way, involved in any litigation.

As to any statement which may have been made by Mr. Wright in connection with Vilencia v. Red Owl, Inc., the case to which reference has been made, the court certainly is not bound by the statements of other people as to the testimony which would be believed. And unless I am greatly mistaken that, again, was a jury case, in which the testimony would be a matter for determination by the jury and not by the court.

It is stated "said judge ordered a further medical examination of plaintiff, a child suing by next friend." (53) The attorney who signed this affidavit stating that it was filed in good faith knows that that is not true. No order has ever been entered in this court requiring the examination by any other doctor, except that in the pre-trial conference it developed that counsel for the plaintiff, Mr. Albert, and I believe Mr. Hook—I am not certain who was in that case; apparently Mr. Hook was not—Mr. Albert agreed that there should be an examination as requested by the defendant, and that appears in the pre-trial memorandum. What information may have been given to the plaintiff about the

court having ordered some such medical examination, the court does not know.

As to the letter which the court addressed to the counsel in the case in reply to a letter from Mr. Wright dated March 25, 1960, with copy to Mr. Albert, the court answered the letter on March 30, 1960, with a copy to Mr. Albert. There was filed a stipulation for continuance, something which is generally not recognized by this court. We do not accept stipulations for continuances, we have not for many years, a matter well known to counsel in the district.

The matter in regard to failure of plaintiff's counsel to follow the rulings of the court refers to the fact that counsel had failed to comply with the court's instructions contained in the pre-trial memorandum, which are as follows:

> (54) "This case will be ready at the April, 1960, term."

It goes on and describes the case. It further says:

> "Trial briefs, which are to be exchanged, and rough drafts of instructions to the jury, are to be filed with the court not later than March 1, 1960."

They were not, and have not been filed as of this date.

It was that to which reference was made, and also because of the inability or failure on the part of counsel to provide for such physical examination.

As to the transcript of the telephone conversation to which reference is made in paragraph 23: In the first place, having failed to receive an explanation, the court pointed out to Mr. Bradt that he should file a brief; not a reply brief, but a brief. He casually informed the court: "Well, as soon as I can, I'll get some briefs out." The court stated: "If you don't get it out promptly, you won't be heard."

Just about two lines further on, Mr. Bradt says: "Judge, would you mind stepping out of this case?" It was suggested to him then that if he wanted us disqualified, he should file his motion.

Paragraph 24 refers to the lack of knowledge on the part of Mr. Bradt and Mr. Albert about a rule prohibiting oral argument on a motion when a brief has not been filed in (55) support of said motion, and states that it has never been adopted by this court.

Mr. Albert, counsel for the plaintiff, knows that that is not true. He has been told in this courtroom, long before the filing of this motion or this affidavit, that when we write for briefs, we expect briefs. That has been true of this and was true when Judge Starr was the judge of this court, and it is still true, both when I sit and when Judge Starr sits.

Paragraph 25 says that the prejudice which the court has against counsel will rub off on the plaintiff, which assumes something that does not exist.

Paragraph 26 says that the affidavit is made in good court when Judge Raymond was the judge of this court, faith. We assume that it is, based upon misinformation.

As to the court passing upon the credibility of the testimony of witnesses, that is not the function of a court in a jury trial.

In addition, and as a further basis for denial of the relief requested by the affidavit, since the case was filed on April 8, 1960, both the plaintiff and defendants asked relief by the filing of motions up to and including May 9, 1960. Since all of the information contained in the affidavit except the telephone conversation with Mr. Bradt was known or should

have been known, or there was no reason (56) why it could not be known, to both the plaintiff and his counsel long before the date on which it was filed, and certainly by June 1, 1960, it would appear that the only reason for the filing of the motion is the fact that one of the counsel for the plaintiff, Mr. Peter E. Bradt, was not permitted to have his own way in regard to the manner in which this court should operate. Unfortunately for Mr. Bradt, this court does not operate at the whim of counsel. It operates in the manner in which the Court decides that it shall operate.

The record may show that despite the great distaste on the part of counsel for the plaintiff in regard to what has been going on in here this afternoon, the plaintiff, himself, has been in the courtroom at all times.

Am I right?

Mr. Humphrey: No.

Mr. Wright: No, your Honor, that is not right.

The Court: I was informed that the gentleman on the right was Mr. Albert.

Mr. Wright: The gentleman is Dr. Albert's father.

The Court: I am sorry. Thank you.

We will recess.

* * * * *

APPENDIX B

OPINION OF THE COURT OF APPEALS

No. 14308

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SAMUEL G. ALBERT, *Petitioner*, v, UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, NORTHERN DIVISION, and HON. W. WALLACE KENT, Judge of said court, *Respondents.*	PETITION for a Writ of Mandamus and Prohibition.

(Filed October 19, 1960)

Before: MILLER, CECIL and WEICK, Circuit Judges.

WEICK, Circuit Judge. This is an original action in mandamus and prohibition to compel the District Judge to certify his disqualification to hear a certain pending action and to prohibit him from conducting further proceedings therein because of his alleged personal bias and prejudice.

An affidavit alleging personal bias and prejudice on the part of the Judge in favor of and against certain parties and attorneys in said pending action in the District Court

was filed by petitioner under the provisions of Title 28 U. S. C. §144.

The District Judge, upon consideration of the affidavit of personal bias and prejudice, held that it was insufficient to require him to disqualify himself and refused to do so. The present proceeding followed in an attempt to obtain a review of the order entered by him.

The mere filing of an affidavit of personal bias and prejudice against the District Judge did not result in his automatic disqualification. The statute requires the affidavit to state something more than that the judge has a personal bias of prejudice. It provides that "The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists. . . ." Title 28 U. S. C. §144.

The District Judge had a duty to determine whether the statutory requirement has been met. To do so he was required to pass upon the legal sufficiency of the affidavit. In the consideration of the matter, he must accept the facts alleged in the affidavit as true, as they may not be controverted. *Green v. Murphy*, 259 F. 2d 591 (CA 3, 1958);[1] *Eisler v. United States*, 170 F. 2d 273 (CA DC, 1948).

The order entered by the District Judge refusing to disqualify himself is not reviewable upon appeal until a final judgment has been entered in the case. *Collier v. Picard*, 237 F. 2d 234 (CA 6, 1956).

---

[1] The decision in this case was criticized in an article entitled "Psychiatric Evidence In The Recusation of Judges" because of the claim that the court did not give proper effect to psychiatric evidence which had been offered. 73 Harvard Law Review 1325.

The opinion of the District Court is reported under the title of *United States v. Gilboy*, 162 F. Supp. 384 (DC MD, Pa., 1958). The District Judge finally did withdraw from the case in order that it could be expeditiously tried. *United States v. Gilboy*, 166 F. Supp. 220.

Before petitioner may resort to the extraordinary writ of mandamus, he must establish that he has a clear and certain right and that the duties of the respondent are ministerial, plainly defined and peremptory. *United States v. Wilbur* 283 U. S. 414; *Girard Trust Co. v. Helvering*, 301 U. S. 540; *Rayborn v. Thomas, Warden,* F. 2d , (CA 6, 1960).

In our view, the consideration by the District Judge of the sufficiency of the affidavit of bias and prejudice is not a ministerial, but a judicial act.

Mandamus does not lie to compel a judge of an inferior court to reverse a decision made by him in the exercise of a legitimate jurisdiction. *Ex parte Flippin*, 94 U. S. 348 (1876), or to compel him to decide according to the dictates of any judgment but his own, *United States v. Lawrence*, 3 Dallas 42 (1795), or to control the exercise of his discretion. *Gottlieb v. Rubenstein*, 252 F. 2d 779 (CA 6, 1958). This remedy is reserved for really extraordinary causes. It may not be used as a substitute for appeal. *Roche v. Evaporated Milk Association*, 319 U. S. 21 (1943); *Beucke v. Weick*, 275 F. 2d 38 (CA 6, 1960).

The writ may be granted only where it is clear and undisputable that there is no other legal remedy. *Ex parte American Steel Barrel Co. and Seaman*, 230 U. S. 35 (1913).

Mandamus has been held not to be the proper remedy to compel a judge to recuse himself. *Green v. Murphy*, 259 F. 2d 591 (CA 3, 1958); *Kaper v. Hoffman*, 212 F. 2d 211 (CA 7, 1954); *Hurd v. Letts*, 152 F. 2d 121 (CA DC, 1945).

In *Connelly v. United States District Court*, 191 F. 2d 632 (CA 9, 1951) the Court issued a writ of prohibition, but the footnote on page 636 of the opinion indicates that no question was raised over its power to do so. This decision was

followed in *Gladstein v. McLaughlin*, 230 F. 2d 762 (CA 9, 1955) wherein the Court of Appeals felt it was unnecessary to issue the writ as the District Judge upon consideration of its opinion would refrain from proceeding further. In concurring, Circuit Judge Pope was of the view that the Court, in this same footnote in *Connelly*, had misconstrued the language of *Berger v. United States*, 255 U. S. 22, which was that "remedy by appeal was inadequate." id. 36. In *Korer v. Hoffman, supra*, it was pointed out that what the Supreme Court in *Berger* was referring to was the efficacy of an appeal if the District Judge had been authorized to decide upon the truth of the facts set forth in the affidavit of bias and prejudice. In any event, *Berger* was not a mandamus case, but was an appeal from a judgment of conviction in a criminal case.

In *Williams v. Kent*, 216 F. 2d 342 (CA 6, 1954) we passed upon the sufficiency of an affidavit of prejudice in a mandamus proceeding "assuming that a writ might appropriately issue in such a case" and held that it failed to show bias or prejudice personal to the District Judge.

In the present case, the District Judge, in an oral opinion, analyzed each of the claims of petitioner and the facts alleged in the affidavit in support of them and pointed out the reasons why the facts did not support the charge of bias and prejudice. In our judgment, he had jurisdiction to do so.

We have carefully examined the affidavit of personal bias and prejudice and are of the opinion that we would not be justified in issuing a writ of mandamus or prohibition. We do not believe that the facts alleged in the petition are sufficient to establish any bias or prejudice personal to the District Judge.

The Petition for a Writ of Mandamus and Prohibition is dismissed.

APPENDIX C

JUDGMENT OF THE DISTRICT COURT

(Filed August 3, 1960)

CIVIL ACTION No. 736

At a session of said Court held in the Federal Building in the City of Marquette, Michigan on August 1st, 1960.

Present: Honorable W. Wallace Kent, Judge, United States District Court.

This matter came before the Court for a hearing on plaintiff's Motion that the Court disqualify itself from taking further part in this case and on plaintiff's affidavit of personal bias and prejudice and the Court after due consideration thereof, denied said Motion.

Therefore, it is ordered that the Motion that Hon. W. Wallace Kent disqualify himself from taking further part in this case be, and it hereby is, denied.

APPENDIX D

JUDGMENT OF THE COURT OF APPEALS

(Filed October 19, 1960)

The Petition for a Writ of Mandamus and Prohibition is dismissed.

APPENDIX E

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Act of June 25, 1948, 62 Stat. 898, as amended May 24, 1949, 63 Stat. 99, 28 USC §144, provides:

> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a

certificate of counsel of record stating that it is made in good faith. June 25, 1948, c. 646, 62 Stat. 898, as amended May 24, 1949, c. 139, §65, 63 Stat. 99."

The Act of June 25, 1948, 62 Stat. 944, amended May 24, 1949, 63 Stat. 102, 28 USC §1651(a), provides:

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 652

SAMUEL G. ALBERT,

Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, NORTHERN DIVISION, and HON. W. WALLACE KENT, Judge of said Court,

Respondents.

BRIEF OF RESPONDENTS ON PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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IN THE

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OCTOBER TERM, 1960

No. 652

SAMUEL G. ALBERT,

Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, NORTHERN DIVISION, and HON. W. WALLACE KENT, Judge of said Court,

Respondents.

BRIEF OF RESPONDENTS ON PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

The above named Respondents, and each of them, pray that the Petition of Samuel G. Albert for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on October 19, 1960, be denied.

OPINIONS BELOW.

Since Petitioner has neglected to print the whole of the Opinion of the District Court for the Western District of Michigan, Northern Division, in Appendix A of his Petition, the omitted portion of such Opinion is printed as Appendix A to this Brief; the partial Opinion printed in Petitioner's Appendix A followed that portion of the Opinion printed herein in Appendix A. Such Opinion is unreported.

QUESTIONS PRESENTED.

Since Respondents cannot agree that Petitioner's Questions Presented (Pages 2-4 of his Petition) is a proper statement of the questions involved, Respondents give their own statement of Questions Presented, as follows:

I.

Was the affidavit of personal bias or prejudice legally sufficient?

Petitioner says: Yes.

Respondents and the Sixth Circuit Court of Appeals say: No.

II.

May a refusal to disqualify be reviewed by petition for writ of mandamus and prohibition?

This question is moot because the Sixth Circuit Court of Appeals held that the affidavit of personal bias or prejudice is insufficient on its face.

STATUTE INVOLVED.

The Statute involved in this case is set out in Appendix E. of the Petition.

COUNTY STATEMENT.

Respondents cannot agree with the so-called "basic facts" set forth in Petitioner's Statement beginning on page 4 of his Brief. In aid of a better understanding of the facts and, Petitioner to the contrary notwithstanding, the only issue involved in this case is whether or not Petitioner's affidavit of personal bias or prejudice is legally sufficient—in other words, whether or not Petitioner's affidavit of disqualification alleges facts sufficient to establish personal bias or prejudice on the part of Judge W. Wallace Kent, a situation analogous to one where the question before the Court is whether or not plaintiff has established facts sufficient to entitle him to go to the jury. Both Judge Kent and the Sixth Circuit Court of Appeals in an unanimous Opinion, held that plaintiff did not allege facts in his affidavit sufficient to establish any bias or prejudice personal to Judge Kent.

Secondly, as a further aid in understanding the facts, it must be called to the Court's attention that Petitioner has confused what happened at the hearing on the sufficiency of his affidavit of bias or prejudice and what happened after the hearing had been concluded and his Motion denied. Clearly, under the law applicable to this case, Petitioner must stand or fall on the allegations in his affidavit and not on anything outside of the affidavit itself.

Coming now to the first statement in Petitioner's so-called basic facts, that the principal issue here is just how biased or prejudiced a Judge must be before it is his duty to disqualify himself from presiding over the trial of a case, we submit that this begs a question and misrepresents the issue; a reading of Petitioner's Petition and Argument shows that no distinction is made between what happened up to the time Petitioner's Motion for disquali-

fication was denied and what happened thereafter. A reading of Judge Kent's Opinion shows that he carefully considered Petitioner's affidavit and held that there was nothing in it to show that he was biased or prejudiced in any way within the meaning of 28 U. S. C. Section 144— and such is also the holding of the Sixth Circuit Court of Appeals.

The second sentence in Petitioner's basic facts states that the secondary issue in this case is whether a refusal to disqualify may be reviewed by petition for writs of mandamus and prohibition or whether the whole case must be tried and then appealed before such preliminary issue can be determined. It is respectfully submitted that this issue is moot because of the finding of the Circuit Court of Appeals:

> "We have carefully examined the affidavit of personal bias and prejudice and are of the opinion that we would not be justified in issuing a writ of mandamus or prohibition. We do not believe that the facts alleged in the petition are sufficient to establish any bias or prejudice personal to the District Judge."
>
> Appendix B, Page 50, Petitioner's Petition.

On Page 5 of the petition, it is stated that Judge Kent is disqualified to preside over any matter connected with said Civil Action No. 736 by reason of personal bias or prejudice; Respondents cannot agree with this statement.

Also on Page 5, it is stated that on July 13, 1960, Judge Kent telephoned to one of Petitioner's Attorneys relative to Briefs and, when requested to step out of the case, the Judge informed said Attorney that a Motion for Disqualification was in order; this is not in conformity with the facts and the Court would probably be most interested in reading a Transcript of this telephone conversation which apparently the Petitioner's Attorney recorded; it is

Exhibit E attached to Petitioner's affidavit of personal bias and prejudice. Judge Kent did not say a Motion for Disqualification "was in order" but he did say that if the attorney wanted any disqualification, "you file a Motion for it".

The statement of facts also implies that Counsel did not file Briefs with Judge Kent because they did not wish to waive the so-called disqualification after having information that Judge Kent was assigned to the case. After receipt of Judge Kent's letter of June 7th and referring again to the telephone conversation on July 13th, Counsel said nothing about not filing Briefs for this reason, but the phone conversation included the following statements on the part of Counsel "Well, I really don't know what we'd file a Brief on", "Well, as soon as I can, I'll get some Briefs out", "Now, why should I file a Brief in—in support of that? It seems silly", "Well, I'll do the best I can about getting a Brief in".

On Page 6, it reiterates some facts (a) to (g) which we shall want to comment upon later.

On Page 7, it is stated that on August 1, 1960, Judge Kent found the affidavit of personal bias and prejudice legally insufficient and materially false and denied the Motion for his disqualification; this is not a correct statement. Judge Kent carefully considered the allegations in Petitioner's affidavit, Paragraph by Paragraph, as is shown in Appendix A to the Petition, Pages 21-30; after considering the legal sufficiency and assuming the truth of the allegations in Petitioner's affidavit, Judge Kent specifically denied Petitioner's Motion that "another Judge be designated in my case" (Appendix A, Page 30) and then, "in fairness to all, the Court having denied the Motion, perhaps it would be well if we go through the affidavit, which

we feel we are justified in doing." (Page 30, Appendix A). There were so many allegations in Petitioner's affidavit which were so obviously false that the District Judge was most obviously right and correct in setting the record straight.

Also on Page 7 it is stated that during the course of the hearing on the Motion for Disqualification, Judge Kent accused one of Petitioner's attorneys of falsehood; no facts are stated to substantiate this. And it is also stated that Judge Kent agreed with the statements made by one or more of the three attorney defendants, either in open Court or in one or more of the counter affidavits; this was done after the Motion had been denied and was not done during the course of considering the legal sufficiency of the allegations in the affidavit.

Again, on Page 7, it is stated that after Judge Kent's decision on the Motion for Disqualification, he summarily convicted and on the following day sentenced both the plaintiff's attorneys for contempt of Court. What this has to do with the legal sufficiency of Petitioner's Affidavit, we do not know and certainly this is immaterial here. Again, Petitioner confuses the issue.

At the top of Page 8, it is stated that Counsel filed only a partial transcript of the proceedings before Judge Kent, along with its Answer, to plaintiff's Petition for writs with the Circuit Court of Appeals. What happened on August 2nd, relating solely to the contempt proceedings, has nothing to do with the issue of the legal sufficiency of Petitioner's affidavit; a full transcript of what happened on August 1st, at the time the District Judge was considering the Motions in this case, was filed and it is noted that Petitioner's Petition here does not con-

tain the complete opinion of the District Court in his Appendix A, the missing parts of which are attached as Appendix A to this Brief.

The question of whether or not Mandamus or Prohibition is a proper remedy to review the refusal of a District Judge to disqualify himself is moot so far as this case is concerned. While it is true that the Sixth Circuit Court of Appeals held that Mandamus or Prohibition is not a proper remedy, it also held that Petitioner's Affidavit is legally insufficient, hence even if Mandamus or Prohibition had been held to be a proper remedy, no such Writ would have been issued by the Court of Appeals. We might add that the question of whether or not Mandamus or Prohibition is a proper remedy in such a case was not involved in *In Re Lisman*, 89 F. 2d 898 (CA 2, 1937); *Foster* v. *Medina*, 170 F. 2d 632 (CA 2, 1948), certiorari denied 1949, 335 US 909; *Henry* v. *Speer*, 201 F. 869 (CA 5, 1913); *Williams* v. *Kent*, 216 F. 2d 342 (CA 6, 1954), which are cited on page 10 of Petitioner's Petition. *In Re Lisman*, *Foster* v. *Medina* and *Henry* v. *Speer*, were all decided on a holding that the Affidavit of personal bias and prejudice was not sufficient and nothing is said in any of these cases about the availability of Mandamus or Prohibition. In *Williams* v. *Kent*, the Sixth Circuit Court of Appeals "assumed" that Mandamus might be the proper remedy and held that the Affidavit failed to show bias or prejudice personal to the District Judge (Honorable W. Wallace Kent). So far as *Connelly* v. *United States District Court*, 191 F. 2d 692 (CA 9, 1951), *Gladstein* v. *McLaughlin*, 230 F. 2d 762 (CA 9, 1955), also cited by Petitioner, are concerned, their authority for Petitioner's position is seriously discounted by the Sixth Circuit Court of Appeals in its opinion in this case.

BASIS OF FEDERAL JURISDICTION.

In general, Respondents agree with Petitioner's statement on the basis of federal jurisdiction except that 16 U.S.C., Sections 1, 2, 15 and 26 are a part of the Federal Statutes with reference to the National Park Service and Yellowstone National Park, and have nothing to do with this case.

REASONS FOR DENYING THE WRIT.

The Writ should be denied because none of the reasons given by Petitioner for its granting are sufficient or accurate.

Contrary to Petitioner's assertion in Paragraph A., both the United States District Court for the Western District of Michigan, Northern Division, and the Sixth Circuit Court of Appeals, in a unanimous decision, held that Petitioner's Affidavit of personal bias and prejudice is legally insufficient. This being true, the Sixth Circuit Court of Appeals would not have issued a Writ of Mandamus or Prohibition even if it had held that either was a proper remedy. The decision of the Sixth Circuit Court of Appeals that Petitioner's Affidavit is legally insufficient is not "*obiter dicta*" as asserted by Petitioner, but a positive finding based on that Court's construction of Petitioner's Affidavit. It has been decided by both the United States District Court for the Western District of Michigan, Northern Division and the Sixth Circuit Court of Appeals; that Petitioner's Affidavit does not establish any personal bias or prejudice on the part of Judge Kent. There is nothing in the record or in Petitioner's Petition to lend any support whatever to any possible contention by Petitioner that the decision of the Sixth Circuit Court of Appeals would have been anything different if it had held that Mandamus or Prohibition is a proper remedy.

Paragraph B. is based on Petitioner's gratuitous assumption that the decisions of the United States District Court for the Western District of Michigan, Northern Division, and the Sixth Circuit Court of Appeals that Petitioner's Affidavit is factually insufficient are erroneous. Nowhere in his Petition does Petitioner offer any reasons or grounds for this assumption nor does he cite or discuss any of the numerous cases under 28 U.S.C., Section 144, or even those cases cited and quoted from by Judge Kent in his opinion in this case.

As to Paragraph C., the cases from the Second, Fifth and Sixth Circuits cited by Petitioner on page 10 of his Petition are not in point, as hereinafter pointed out and the decisions from the Ninth Circuit to which Petitioner refers are clearly distinguished and discounted by the Sixth Circuit Court of Appeals in its opinion in this case.

ARGUMENT.

Petitioner's Argument starts out on the theory that his right to practice medicine is a property right which is protected by the Fifth Amendment and that a trial by a so-called bias Judge is not in conformity with due process. We do not follow this.

> "The right to practice medicine is not a property right. Appellants are merely licensees as medical practitioners and their licenses may be revoked at any time for cause."
>
> *Findlay* v. *Board of Supervisors*, 72 Ariz. 58, 230 P. (2d) 526, 24 A.L.R. (2d) 841.

See also

> *People* v. *Blair*, 192 Mich. 183, 158 N. W. 889.
>
> *People* v. *Carroll*, 274 Mich. 451, 264 N. W. 861.
>
> "Admission to professions may also be regulated without violation of the privileges and immunities clauses of the Federal Constitution. For example, although it is true that the practice of law is a lawful occupation in itself, it is also well established that it is not a natural right or a right guaranteed by the Constitution, but a privilege granted by the state and one which may be surrounded with whatever restrictions the legislature may in reason prescribe. Likewise, the privileges and immunities of national citizenship do not include the right to practice medicine."
>
> 12 *American Jurisprudence*, *Constitutional Law*, Paragraph 461.

The only question in this case is whether or not there is any sufficient reason for this Court to review the determination of the District Court and the Circuit Court of Appeals, that the Affidavit of personal bias and prejudice filed by Petitioner in the District Court is insufficient to estab-

lish any bias or prejudice personal to the District Judge. This question has been completely ignored by Petitioner in his Argument; Petitioner has assumed facts which both the District Court and the Court of Appeals held were not established or, which, if the Affidavit contained anything which might tend to support them, are immaterial.

We should like to consider the conclusions which are contained in Petitioner's Petition on Pages 2 and 13.

(a) It is stated that the Judge has stated he would not believe plaintiff under oath; we do not know the factual basis for this statement and Petitioner cites none. If this statement is made in connection with Paragraph 22 of Petitioner's Affidavit (which is in fact, factually false), then the statement is hearsay so far as Petitioner is concerned and his Affidavit contains no allegation that the alleged statement was made by authority or with the knowledge of Judge Kent.

(b) That the Judge accused the plaintiff of falsehood; no facts are set forth to support this allegation. However, after the Motion for Disqualification was denied, Judge Kent accurately described the situation as follows:

> "Paragraph 26 says that the Affidavit is made in good faith. We assume that it is, based on misinformation" (Petitioner's Appendix A. p. 45).

Plaintiff had taken the precaution of fortifying himself against any charges of making false statements by making his Affidavit "on information and belief."

(c) That the Judge accused one of plaintiff's attorneys of falsehood; there are no facts set forth in support of this allegation and certainly there is nothing in any proceeding up to the time the Motion was denied, supporting such a charge. The allegation is immaterial.

(d) That the Judge threatened one of plaintiff's attorneys with "difficulty" in the trial of the case; this apparently refers, again, to the recorded telephone conversation between the Judge and one of the attorneys, but even taking the statement for what it is worth, it is immaterial because it was between the Judge and one of the attorneys and does not demonstrate any personal bias or prejudice against the plaintiff and relates solely to the relationship between the Court and a member of the Bar who had failed to comply with a request from the Court.

(e) That the Court threatened plaintiff's other attorney with "embarrassment" in the trial of another case; again, this is immaterial, relates to a case in which the Petitioner was not a party and involved none of the defendants as parties.

(f) That the Judge has a personal friendship and a social, political and fraternal relationship with the three defendants who are also defense attorneys in the case; if this allegation is material enough to require consideration, reference is made to the District Judge's consideration of the sufficiency of this allegation in his Opinion before he denied the Motion for Disqualification.

(g) That the Judge has received secret Briefs from one or more of said three defendants about the case; no facts are given to support this allegation and it is therefore immaterial.

(h) That the Judge uses one of the three defendants as a courier to carry his communications to one of plaintiff's attorneys; presumably, this is based on Paragraph 10 of Petitioner's Affidavit but is without any factual basis, is entirely outside the knowledge of the District Judge and

could not be attributable to the Judge, it being purely hearsay.

(i) That the Judge accepted an invitation from one or more of the three defendants to be a featured speaker at a Bar gathering where the Judge was to be on the program with these and other defendants; aside from not being factually correct, this is immaterial and is fully explained in the District Judge's comments made before Petitioner's Motion was denied.

(j) That the Judge, after denying the Motion for his disqualification, summarily convicted and sentenced both plaintiff's attorneys for contempt of Court; this had nothing to do with any proceedings before the denial of the Motion for Disqualification and certainly was a fact which came into being after the Motion was considered and denied. We are at a loss to understand why the District Judge should be blamed for something which Petitioner's attorneys brought on themselves by their own misconduct. This certainly has nothing to do with the issue or the merits of this particular case.

(k) That the Judge based his Decision denying plaintiff's Motion for Disqualification at least in part, upon the alleged falsity of plaintiff's Affidavit of personal bias or prejudice; this is untrue. A reading of the District Judge's Opinion will clearly show that he assumed all the facts in the Affidavit to be true in passing upon the Affidavit and before he ruled on it. Petitioner cites no facts to show that this statement is true.

(l) That the Judge at the disqualification hearing agreed on the record with the allegations of Counter Affidavits filed by the three defendants, which Counter Affidavits denied material allegations of plaintiff's Affidavit of personal bias or prejudice; again, this has nothing to

do with the merits of this particular proceeding because the District Judge assumed all the facts in the Affidavit to be true before he ruled on Petitoner's Motion for Disqualification. Some of the alleged facts in Petitioner's Affidavit were impertinent and scandalous and false and we know of no reason why, after a proper consideration of the Affidavit and Motion, the District Court did not have a right to set the record straight.

(m) That the Court held that the plaintiff, by filing Motions and demanding a jury trial prior to the assignment of said Judge to the case, had waived his right to disqualification; this is not true, there is nothing in the Judge's Opinion indicating that plaintiff had waived any right and the Judge's ruling was not based upon waiver.

Again, we must reiterate that the sole question here is whether or not Petitioner's Affidavit of bias or prejudice was sufficient for disqualification, that Petitioner has confused the facts and issue by not distinguishing what happened before and after the denial on the part of the District Judge. Petitioner has now attempted to add immaterial facts and allegations to the grounds for disqualification and, after clear cut rulings by the District Court and the Circuit Court of Appeals on the issue of disqualification, has raised side issues which are immaterial or moot.

The only question in this case is whether or not there is any sufficient reason for this Court to review the determination of the United States District Court for the Western District of Michigan, Northern Division and the Sixth Circuit Court of Appeals that the Affidavit of Personal Bias and Prejudice filed by Petitioner in the District Court is insufficient to establish any bias or prejudice personal to the District Judge. This question has been completely

ignored by Petitioner in his Argument (pp. 11-20) of his Petition. In his argument Petitioner has assumed facts which both the District Court and the Circuit Court of Appeals held were not established or which if the Affidavit contains anything which might tend to support them, are immaterial.

It is provided by Supreme Court Rule 19, so far as pertinent here, as follows:

> "Considerations governing review on certiorari. —1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered: * * *
>
> (b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

It is said in 36 C.J.S., PP. 649-650, Federal Courts, Section 204 (3), in referring to a writ of certiorari:

> "The writ may properly be refused where the error complained of does not or will not affect the substantial rights of the parties; as where, despite the error, the correct result will be or has been reached on some other ground; and this is so even though the question is one of public importance, since the Supreme Court decides questions of public importance

> only in the context of meaningful litigation, and even though the decision appealed is in conflict with decisions of other courts of appeals, since the function of the Supreme Court in resolving conflicts among the courts of appeals is judicial, not simply administrative or managerial. Similarly, certiorari will not ordinarily be granted where a case has become moot",

citing the *Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180, 79 S. Ct. 710, 3 L. Ed. (2d) 723.

It is said in 54 American Jurisprudence, P. 874, United States Courts, Section 235, that:

> "Jurisdiction on certiorari was not conferred merely to give the defeated party in the lower court another hearing, or merely to review the evidence or inferences drawn from it. Hence, the writ will not ordinarily be granted to review decisions or judgments based solely on questions of fact, such as a ruling of the trial court, upheld by the appellate court, refusing to submit certain questions to the jury",

Citing:

Magnum Import Co. v. *Coty*, 262 US 159, 43 S. Ct. 531, 67 L. Ed. 922.

General Talking Pictures Corp. v. *Western Electric Co.*, 304 U.S. 175, 58 S. Ct. 849, 82 L. Ed. 1273.

National Labor Relations Bd. v. *Waterman S.S. Corp.*, 309 U.S. 206, 60 S. Ct. 493, 84 L. Ed. 704, rehearing denied 309 U.S. 696, 60 S. Ct. 611, 84 L. Ed. 1036,

and other Supreme Court cases.

We do not believe that we can improve on the analysis of the decisions under 28 U.S.C. Section 144, given by Judge Kent in his opinion in this case found in Appendix A, Pages 23-34 of this Brief, and not repeated here in the interest of brevity.

In addition to the cases cited by Judge Kent in his opinion, set out in Appendix A, we call the attention of the Court to the following decisions:

United States v. *Onan, Eighth Circuit Court,* 190 F. 2d 1, where it is said:

> "While the facts alleged in the Affidavit of prejudice must, for the purpose of the motion, be accepted as true, the reasons and facts forming the basis for the belief are of paramount importance and must give support to the charge of bias and prejudice."

Incidentally, it has to be a personal bias and prejudice.

Morse v. *Lewis,* C.C.A. 4, 54 F. 2d, 1027.

In that case, there was a general affidavit that the Judge was entirely too friendly, both on a business and social basis, with the defendants, who happened to be rather numerous. The Circuit Court of Appeals said, after reviewing it, and the Judge having found that it was not sufficient:

> "Accordingly, the judge did so, and ruled that the affidavit was insufficient; and having no knowledge of business or social relations on his part with the defendants, he proceeded to hear and determine the motion to dismiss the Bill of Complaint."

Wilkes v. *United States, Ninth Circuit Court,* 80 F. 2d 285, where it is said:

> "To satisfy the requirements of section 104 (now section 144)—the facts stated in the affidavit 'must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment.' . . . The affidavit must 'assert facts from which a sane and reasonable mind may fairly infer bias or prejudice.' . . . These facts 'Should be set out with at least that particularity one would expect to find in a bill of particulars filed by a pleader in an action at law to supplement and explain the general statements of a formal pleading.' "

The assertion on Page 14 of Petitioner's Brief that, "When Judge Kent determined that material allegations in the Affidavit of Personal Bias or Prejudice were false he was, in effect, calling the plaintiff a liar" is without support in the record. Plaintiff had very carefully insulated himself from any charge that he was "a liar" by making his Affidavit "on information and belief". Also, at all times prior to his decision that Petitioner's Affidavit was insufficient in law, Judge Kent very carefully assumed that all of the facts alleged in the Affidavit were true, which fully appears from Judge Kent's opinion, Appendix A, *infra* and Petitioner's Appendix A. As to what Judge Kent said after he had denied Petitioner's Motion, many of the things upon which he commented were peculiarly within his personal knowledge. The fact that Judge Kent, from his personal knowledge may have agreed with some of the things set out in the Counter-Affidavits to which Petitioner refers, which, as the record shows, were filed for the purpose of setting the record straight and not for use in the disqualification hearing, is an immaterial coincidence. The contention of Petitioner, that Judge Kent, having assumed the truth of all of the facts set out in Plaintiff's Affidavit, and on that basis having held the Affidavit insufficient could not, after the denial of Petitioner's Motion was a matter of record, and for the purpose of defending himself and the integrity of his Court, point out wherein the Affidavit was false, slanderous and ill-founded, if sustained, could easily place the Court in the very embarrassing position of being unable to defend itself from an unfounded and scandalous attack.

If the Plaintiff can prevail on his Affidavit of Disqualification in this case, then any Plaintiff who, for any reason, however insufficient, wants another Judge in any case, can successfully challenge the sitting Judge by an Affidavit

setting forth conclusions only, wholly unsupported by any allegations of fact upon which such conclusions are alleged to be based and the Judge is at the mercy of such an Affidavit containing innuendoes, defammatory to the Judge and which are obvious product of someone's imagination. Such an Affidavit sworn to on "information and belief" carefully avoids assuming any personal responsibility or exposing the affiant to a charge of perjury. We just cannot believe that such an Affidavit is sufficient under the Statute. Disqualification of a Judge is a serious and most unusual matter and should be based on a great deal more than Plaintiff has offered in this case.

The fact that apparently Counter-Affidavits, or even the Judge's own knowledge of the facts, may not be resorted to for the purpose of showing the inaccuracy or falsity of such an Affidavit, is an open invitation to a party to play fast and loose with the facts, if he thinks he can get away with it. It is interesting to note that plaintiff's attorneys do not certify to their good faith in filing the Affidavit but only certify to plaintiff's good faith, of which they can have little or no personal knowledge.

We respectfully submit that Petitioner has failed to present any reason why the decision of Judge Kent, affirmed unanimously by the Sixth Circuit Court of Appeals that:

a. The Affidavit is legally insufficient.

b. The Affidavit does not set out time, place, persons, occasions or circumstances with the required degree of particularity.

c. The Affidavit does not, as a matter of law, and assuming the allegations therein to be true, show any personal bias or prejudice on the part of Judge Kent either against the plaintiff or in favor of the defendants.

d. The Affidavit sets forth only allegations which are conclusions, hearsay, assumptions and innuendos, which do not rise to the dignity of required factual allegations.

e. The Affidavit utterly fails in meeting the test of *personal* bias and prejudice, of impeaching the District Judge's impartial exercise of his functions in the principal case and of overcoming the presumption in favor of the District Judge's integrity and independence, should be disturbed.

As to Petitioner's contention that the Sixth Circuit Court of Appeals erred in holding that Petitioner is not entitled to a Writ of Mandamus or Prohibition in this matter, the point is immaterial and moot. From the opinion of the Sixth Circuit Court of Appeals, Appendix B. of the Petition, the result would have been the same, so far as Petitioner is concerned, regardless of what the Sixth Circuit Court of Appeals held with reference to the availability of Mandamus or Prohibition. In its final disposition of this case the Sixth Circuit Court of Appeals says as follows:

> "In *Williams* v. *Kent*, 216 F2d 342 (CA 6, 1954) we passed upon the sufficiency of an affidavit of prejudice in a mandamus proceeding 'assuming that a writ might appropriately issue in such a case', and held that it failed to show bias or prejudice personal to the District Judge.
>
> "In the present case, the District Judge, in an oral opinion, analyzed each of the claims of petitioner and the facts alleged in the affidavit in support of them and pointed out the reasons why the facts did not support the charge of bias and prejudice. In our judgment, he had jurisdiction to do so.
>
> "We have carefully examined the affidavit of personal bias and prejudice and are of the opinion that we would not be justified in issuing a writ of mandamus or prohibition. We do not believe that the facts alleged in the petition are sufficient to establish any bias or prejudice personal to the District Judge."

CONCLUSION.

For the foregoing reasons, we respectfully submit that Petitioner's Petition for Writ of Certiorari should be denied.

Dated at the City of Ironwood, Gogebic County, Michigan this 3rd day of February, 1961.

Respectfully submitted,

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APPENDIX A.

THAT PART OF OPINION OF THE DISTRICT COURT OMITTED FROM APPENDIX A OF PETITION.

The Court: This is the case of Samuel G. Albert, Plaintiff, *vs.* Frank A. Drazkowski, Jr., and others, File No. 736.

The first matter to be disposed of is the Affidavit of Personal Bias or Prejudice filed by the plaintiff.

Do you gentlemen care to be heard?

Mr. Albert? Mr. Bradt?

Mr. Bradt: May it please the Court: I have a brief in support of that affidavit which I will file with Your Honor now.

The Court: Is there any reason why it has not been filed earlier?

Mr. Bradt: And which I will hand to counsel.

And Plaintiff's Exhibit G, which is referred to in the affidavit, I filed this morning with the clerk's office.

All of the counsel for defendants have a copy of that except Mr. McMillan, and I am giving him one now.

The Court: Anything further?

Do counsel for the defendants wish to be heard?

Mr. Humphrey: May it please the Court: I certainly would like to make a statement to the court in connection with that affidavit.

Personally, as a member of the bar of the court, I greatly resent the implication of lack of integrity upon the part of the court and upon counsel in this case, and I have so filed an affidavit, whether it will be made a part of the record or not. But I don't believe I can stand by and let the allegations in that affidavit go unchallenged; and for the purposes of the record, I certainly want to state that many of the facts in there are false, that the implications to be drawn from those facts that would indicate any bias or prejudice on the part of counsel are false.

I don't know whether it is in order or not, but I think that the affidavit should be stricken from the files, it being scandalous, impertinent, and a sham.

Mr. Wright: If the Court please: Mr. Humphrey has pretty well expressed my sentiments in regard to this. I, also, have filed an affidavit setting out the ways and places in which this affidavit of prejudice is contrary to the record and contrary to fact; and although I realize that the rules say that counter-affidavits may not be considered on a motion of this kind, yet I felt, with Mr. Humphrey and Mr. Pellow, that we ought to set the record straight because of numerous things that were stated in that affidavit that are not true and carry improper implications.

Another thing in regard to the affidavit: I want to call the court's attention to one thing that I think indicates that it is fatally defective, and that is the certificate of good faith that is attached to the affidavit.

That certificate says:

> "We the undersigned Peter E. Bradt and Theodore G. Albert, counsel of record in said cause, hereby certify that the above affidavit made by Samuel G. Albert, plaintiff in said cause, is made in good faith by him."

It is signed by Mr. Bradt, who also signed Mr. Albert's signature to it.

Now, it is my construction of the statute—and I have at least one district court that agrees with me—that that is not sufficient, that the certificate of good faith is not of the deponent or plaintiff in making the affidavit, but the good faith of counsel in filing it.

The case to which I call the court's attention is *United States* v. *Flegenheimer*, which was decided by the District Court for the Western District of New Jersey, on October 22, 1935. It is found in 14 F. Supp. 584, and the part that I am going to read to the court is found on page 592. It was a similar affidavit that was made by the attorneys that the deponent had filed it in good faith.

> "The affidavit is, in our view, further invalidated because of the form of the certificate of counsel attached thereto. It is there certified that the application and affidavit are made in good faith by the defendant," who was the deponent. "We do not conceive that this is the purpose of the certificate. The terms of the statute include no such qualification as is apparently read into it by counsel. It is not there stated that the affidavit and application are made in good faith 'by him, by the party or any words of that character.' Clearly, the statute could not have been so drawn. Counsel can hardly be required to certify to the good faith of a client. They cannot be asked to set themselves up as guarantors of his mental processes. They can only be required to certify with respect to their own. In the case at bar, they would manifestly have not even attempted to do so."

And then it goes on and explains why.

Now, as I say, under that case the certificate is fatally defective and is sufficient to throw it out.

I could go through a good many of these things that are alleged here. As I understand it, as was said in *United States* v. *Onan*, Eighth Circuit Court, 190 F. 2d 1:

> "While the facts alleged in the affidavit of prejudice must, for the purpose of the motion, be accepted as true, the reasons and facts forming the basis for the belief are of paramount importance and must give support to the charge of bias and prejudice."

Incidentally, it has to be a personal bias and prejudice.

Then, the case of *Morse* v. *Lewis*, C.C.A. 4, 54 F. 2d 1027. In that case, there was a general affidavit that the judge was entirely too friendly, both on a business and social basis, with the defendants, who happened to be rather numerous. The Circuit Court of Appeals said, after reviewing it, and the judge having found that it was not sufficient:

> "Accordingly, the judge did so, and ruled that the affidavit was insufficient; and having no knowledge of business or social relations on his part with the defendants, he proceeded to hear and determine the motion to dismiss the bill of complaint."

And then it was said, in *Wilkes* v. *United States*, Ninth Circuit Court, 80 F. 2d 285:

> "To satisfy the requirements of section 104"—he calls it, in that, section 21, which it was at the time of that decision—"the facts stated in the affidavit 'must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment.' . . . The affidavit must 'assert facts from which a sane and reasonable mind may fairly infer bias or prejudice.' . . . These facts 'should be set out with at least that particularity one would expect to find in a bill of particulars filed by a pleader in an action at law to supplement and explain the general statements of a formal pleading.'".

But I am certain that the court has checked into the law on this, and just a quick run-down on some of the things that are alleged in here—

The Court: I think that will be unnecessary, Mr. Wright.

Mr. Wright: Thank you, Your Honor.

The Court: Do you other gentlemen care to be heard? Will you identify yourselves, starting on the right?

Mr. William F. Pellow: William F. Pellow.

Mr. McMillan: Myron A. McMillan.

The Court: Are you an attorney with the Attorney General's Office?

Mr. McMillan: Yes.

Mr. William P. Pellow: My name is William P. Pellow. I am the prosecuting attorney of Gogebic County.

The Court: Do counsel for the plaintiff care to be heard?

Mr. Bradt: I would like to direct Your Honor's attention to the language quoted from the *Murchison* case, which begins on the first page of the brief.

The Court: Is that a disqualification case under the statute?

Mr. Bradt: No, Your Honor. It indicates that perhaps the disqualification statute and the case law cited by counsel does not go quite far enough.

The Court: Aren't there sufficient decisions under the disqualification statute to cover the subject?

Mr. Bradt: I don't think there are, Your Honor. Obviously, if the constitution requires one thing and the case law and the statute require something different, the constitution would seem to prevail.

The Court: In other words, it is your opinion that the decisions of the United States Supreme Court interpreting this statute are not broad enough?

Mr. Bradt: No, Your Honor. I didn't understand that any such were cited to us here.

The Court: Are you suggesting that they are not available?

Mr. Bradt: I will say that I don't know of any which say that due process of law is afforded where the trial or proceeding is presided over by a judge who may be biased or prejudiced.

The Court: "May be," Mr. Bradt?

Mr. Bradt: Yes, Your Honor.

The Court: Is that the tenor of this affidavit, that he "may be"?

Mr. Bradt: No, Your Honor.

The Court: All right. Is there anything further?

Mr. Bradt: That is all, Your Honor.

The Court: The record should show that on April 8, 1960, the plaintiff filed his complaint in this court, and a summons was issued. Thereafter, there were motions filed by various defendants. Included in the complaint was a request for a temporary injunction. On May 9, 1960, plaintiff filed a notice of hearing on motion for temporary injunction, and filed a notice of hearing on motion for leave to file and serve a second amended and supplemental complaint. Thereafter, and on July 18, there was filed the plaintiff's affidavit of personal bias or prejudice directed against the judge.

Under the provisions of Title 28, United States Code, Section 144, which reads as follows:

> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> "The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

And to interpolate, I may say that I do not agree with the district judge whom you quoted, Mr. Wright, in regard to the certificate. A careful reading of the statute would show that one sentence refers to the filing of the affidavit, and the final sentence says that: "It"—and "It" can mean nothing but the affidavit—"shall be accompanied by a certificate of counsel of record stating that it"—again meaning the affidavit—"is made in good faith." I am satisfied, from reading the statute, that the certificate is sufficient to comply with the statute.

Now, to summarize the affidavit:

Paragraphs 1, 3, 4 and 5 refer to the position of the parties in this lawsuit.

Paragraph 2 recites a statement by the affiant that the judge "has a personal bias or prejudice in favor of defendants Charles M. Humphrey, Jr., Ivan D. Wright and William F. Pellow, and against me."

Paragraph 6 sets forth that the named counsel have an extensive practice in the court, and the details as to the number of cases filed by various counsel.

It is stated in paragraph 7 that the judge is a personal friend of the defendants Humphrey, Pellow and Wright, and that they enjoy social and professional contacts with said judge of a far more intimate nature than the ordinary attorney-judge relationship.

Paragraph 8 recites the fact that the judge belongs to the same political party as the defendants; that they became acquainted in that manner; that he dines with the defendants when holding court, and entertains the defendants in chambers.

Paragraph 9 refers to a letter addressed to Mr. Wright by the court in which the heading read "Dear Ivan," a copy of which is attached to the affidavit, showing that a copy of such letter was sent to all of the attorneys of record in the case.

Paragraph 10 states that Attorney Albert has received communications and instructions through the Defendant Wright, alleging that Wright has received them through direct communication with the court.

Paragraphs 11, 12, 13 and 14 refer to the Upper Peninsula Legal Institute, and to the invitation which has been extended to the judge to speak at that Upper Peninsula Legal Institute on the subject of pre-trial conferences and recite certain things in regard to the handling of the institute, itself, and the extending of the invitation, and certain alleged activities on the part of the defendants who are also counsel and lawyers.

Paragraph 15 recites that Attorney Wright is campaign manager for the congressman for the twelfth congressional

district, which is one of the districts in which this court sits, or one of the districts which is within the jurisdiction of this division of the court, and that Mr. Wright was consulted in regard to the appointment of the court.

Paragraph 16 includes some quotations from Mr. Wright in connection with another case now pending before the court.

Paragraph 17 states some comments by the affiant as to his understanding from his counsel as to the law relating to conspiracy cases.

Paragraph 18 recites that the judge is the head of a "secret fraternal organization, to which he was elected since the commencement of this lawsuit by his brother members including said defendants"; which, for the information of counsel if they do not know, occurred on the 25th day of May in Detroit. The organization referred is the Grand Lodge of Free and Accepted Masons of t State of Michigan, which has 175,000 members.

Paragraph 19 recites the canons of professional ethics which apply to counsel.

Paragraph 20 recites the canons of judicial ethics which apply to said judge.

Paragraph 21 recites that there have been violations of the canons of ethics through acceptance of briefs without requiring that they be exchanged; and that it would be a violation of said canons of judicial ethics to accept an invitation to speak at the Upper Peninsula Legal Institute in violation of Judicial Canon 13.

Paragraph 22 refers to certain conversations between the Defendant Wright and plaintiff's counsel and brother in regard to another case now pending before this court, and also refers to a letter in regard to a continuance in the case.

Paragraph 23 recites that the defendants have poisoned the judge against the plaintiff, and covers a telephone conversation between the court and one of the attorneys for the plaintiff, a transcript of which, made without the court's knowledge, was attached to the affidavit.

Paragraph 24 refers to a rule in regard to oral arguments where briefs have not been filed in accordance with the instructions from the court.

Paragraph 25 states that the plaintiff believes that the personal bias or prejudice which the judge has against the plaintiff's attorneys is "bound to rub off on me in connection with my case," and that it will make it impossible for the court to hear the case in an unbiased fashion.

Paragraph 26 recites the good faith of the plaintiff in filing the affidavit.

Paragraph 27 recites that even if the judge has no bias or prejudice, he could not impartially pass upon the credibility of the testimony of the defendants.

And the last paragraph requests that another judge be designated in the case.

There can be no question, under the decisions, that it is the duty of the judge against whom the affidavit is filed to consider the affidavit and determine its legal sufficiency under the provision of the statute which has been read, the recent case being *Green* v. *Murphy*, 259 F. 2d 591, a Third Circuit decision in 1958, where the court, at page 593, stated:

> "We are of the opinion that the case at bar is ruled by legal principles which, although they may have been cloudy in the past, are now clearly defined. It is now settled law that the judge against whom an affidavit of bias and prejudice is filed under Section 144, must himself pass on the legal sufficiency of the facts alleged and that in so doing he must accept the allegations of

the affidavit as true. A United States district judge therefore possesses the jurisdiction, the power, to pass upon the question as to whether he must withdraw from the case by reason of the allegations of his disqualification contained in the affidavit."

To the same effect is *Eisler* v. *United States*, 170 F. 2d 273, where, at page 278, the court stated:

"We are of the opinion that the lower court properly determined, as the second ground for striking the affidavit, that it was legally insufficient to show personal bias or prejudice regarding the justiciable matter pending before the court. The Supreme Court has ruled that the judge has a lawful right to pass on the legal sufficiency of the affidavit, *Berger* v. *United States*, 1921, 255 U. S. 22, 41 S. Ct. 230, 65 L. Ed. 481, subject to appellate review, of course, and we consider it the duty of the judge, when the showing for recusation is insufficient, to remain in the case."

One of the best statements regarding the affidavit which must be filed is found in the *Eisler* case previously cited, at page 278, where the Court of Appeals for the District of Columbia stated:

"The basis for disqualification upon affidavit is that the judge has personal bias or prejudice either against the affiant or in favor of an opposite party, by reason of which the judge is unable to impartially exercise his functions in the particular case. *Ex Parte American Steel Barrel Co.*, 1913, 230 U. S. 35, 33 S. Ct. 1007, 57 L. Ed. 1379. This court said, in *Hurd* v. *Letts*, *supra*:

"'Nothing is now better established than the rule that a sufficient affidavit under the statute must state facts and reasons which tend to show personal bias and prejudice *regarding the justiciable matter pending* and must give support to the charge of a bent of mind that may prevent or impede impartiality of judgment. *Berger* v. *United States*, 255 U. S. 22, 33, 41 S. Ct. 230, 65 L. Ed. 481.

"'Accordingly, the question in all such cases is whether the affidavit asserts facts from which a sane and reasonable mind might fairly infer personal bias or prejudice on the part of the judge. * * *' (Italics supplied.)"

Probably the best exposition of the law in regard to this whole subject can be found in *Cole* v. *Loew's, Inc.*, a decision at 76 F. Supp. 872, by Judge Yankwich, of the District Court for the Southern District of California, a decision handed down in 1948. I am not going to read the decision at length for obvious reasons. It runs from page 872 to page 881, and, therefore, I do not deem it necessary to read the very exhaustive consideration of the applicable law by Judge Yankwich. I do call attention to certain quotations. At the bottom of page 879, relating to other cases in which the same parties were included in which there had been no affidavit, Judge Yankwich states:

"As they have not attempted to disqualify me in any case except this, am I to allow them to tell me which cases they *wish me to try and which to transfer out?* I fear that if this were done, there would be established a dangerous precedent, which would allow a litigant to 'go shopping' for a judge. With such a precedent to rely on, persons or corporations involved in much litigation before the federal courts *might* attempt to select the judge whom they wish to try a particular case by making unsubstantial charges or try to cow or intimidate judges by threats of making charges based upon unsubstantiated gossip. *I have too much faith in the integrity, courage and independence of my colleagues on this and other federal trial benches to fear that this would succeed. But the very possibility of its being done would breed arrogance in certain litigants, and the independence of the Federal Judiciary would suffer.*"

He quotes from a statement by the Honorable Alexander Wiley, United States Senator from Wisconsin and then

Chairman of the Judiciary Committee of the United States Senate, as follows:

> "'An independent Judiciary is a strong Judiciary, a fearless Judiciary, having respect for its co-equal branches of the government, but respecting even more its paramount obligation to the American people in interpreting the supreme law of the land.'"

That speech may be found reported at 7 Federal Rules Decisions. The quotation is from page 556.

Judge Yankwich goes on to state:

> "Of necessity, when a judge declines to disqualify himself, he is, from a purely personal standpoint, placed in a rather uneasy position. No judge can take pleasure in staying in a case when he feels that one of the litigants does not want him. And, ordinarily, the feeling expressed by the Supreme Court applies:
>
> "'For of what concern is it to a judge to preside in a particular case; of what concern to other parties to have him so preside?'" quoting from the *Berger* case at page 35.

Judge Yankwich goes on:

> "This is not only my general feeling, but my feeling in the case. I have no *particular* interest in this case. As I view it, it *does not* even present the type of legal problem in which a judge would be greatly interested or in which his experience or learning might show to advantage. *It is just another lawsuit.* Nor have I any interest in either litigant. . . . *If I felt any bias or prejudice against either party, I should withdraw from the case, affidavit or no affidavit.*"

I am not going to quote further from Judge Yankwich's opinion. I do call it to the attention of counsel and suggest that it be read carefully.

The *Green* v. *Murphy* case previously cited is most interesting. It runs in the opposite direction from this case. The affidavit was filed because the affiant was of the opinion that he and Judge Murphy, against whom the

affidavit was made, were such close friends that the petitioner would be unable to receive a fair trial, since Judge Murphy would bend over backwards not to show bias in favor of the petitioner; quite different from this case.

Another interesting case is *Tucker* v. *Kerner*, 186 F. 2d 79, a decision of the Seventh Circuit in 1950, involving the Tucker automobile company. An affidavit was filed against Judge Igoe, of the District Court in Chicago. The affidavit relied upon statements made by the judge during hearings and upon statements reported in a magazine article supposed to have been made by Judge Igoe.

The Court of Appeals held that the magazine article was not attributable to the judge and was hearsay as to him. The court also felt that statements made from the bench were not of the type which indicated personal bias, especially since the name of Preston Tucker had not been mentioned by the judge.

In *Gallarelli* v. *United States*, 260 F. 2d 259, a First Circuit decision in 1958, the court cited from *Ex parte American Steel Barrel Co.*, a 1913 decision found in 230 U. S. 35, at pages 43 and 44:

> "The basis of the disqualification is that 'personal bias or prejudice' exists, by reason of which the judge is unable to impartially exercise his functions in the particular case. It is a provision obviously not applicable save in those rare instances in which the affiant is able to state facts which tend to show not merely adverse rulings already made, which may be right or wrong, but facts and reasons which tend to show personal bias or prejudice. It was never intended to enable a discontented litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise, but to prevent his future action in the pending cause. Neither was it intended to paralyze the action of a judge who has heard the case, or a question in it, by the interposition of a motion to disqualify him between a hearing and a determination of the matter heard."

In *United States* v. *Gilboy*, 162 F. Supp. 384, a decision from the Middle District of Pennsylvania in 1958, the following quotation is found at pages 391 to 394:

"As to the certificate itself, §144 provides,"

and it quotes the statute.

That is the decision which Mr. Wright cited, I believe, or one to the same effect. Going on, it states:

"'A motion to disqualify * * * is a serious undertaking * * *.'" Citing the District Court for the District of Massachusetts. And quoting Judge Prettyman in the *Eisler* case: "'* * * these affidavits should be prepared with the utmost care and certainty as to the facts. The courts should encourage careful consideration and deliberation on the part of counsel * * *. The rule ought to be that they be filed with the utmost deliberation consistent with the undelayed dispatch of the business of the court.' * * *.

"The test for determining the sufficiency of the affidavit . . . was laid down by the Supreme Court in *Berger* v. *United States*, *supra*, 255 U. S. at page 33, 41 S. Ct. at page 233, '* * * the reasons and facts for the belief the litigant entertains are an essential part of the affidavit, and must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment'; and we add regarding the justiciable matter pending." Citing cases.

"Mere rumors or gossip are not enough. . . . Time, place, persons, occasions and circumstances must be set forth," citing cases, "with at least the degree of particularity one would expect to find in a bill of particulars." Further citing cases. "So plainly that one may determine whether they suffice to show the objectionable inclination or disposition of the judge and to support an honest belief in the disqualifying state of mind." Citing cases. "A prima facie case will not suffice. It must be strong enough to overthrow the presumption in favor of the trial judge's integrity and of the clearness of his perceptions.'" Citing a further case.